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COURTS MARTIAL

LOYDON: PRINTED BY
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AND PARLIAMENT STREET

THE
CONSTITUTION AND PRACTICE
OF
COURTS MARTIAL

WITH A

Summary of the Law of Evidence

AS CONNECTED THEREWITH

ALSO SOME

NOTICE OF THE CRIMINAL LAW OF ENGLAND

WITH REFERENCE TO THE TRIAL OF CIVIL OFFENCES

By THOMAS FREDERICK SIMMONS, Esq.

CAPTAIN H.P. ROYAL ARTILLERY, DEPUTY JUDGE ADVOCATE

CONTINUED BY

THOMAS FREDERICK SIMMONS

M.A. OXFORD, M.C.C. SANDHURST

SOMETIME MAJOR OF BRIGADE, NORTH EASTERN DISTRICT, AND DEPUTY JUDGE ADVOCATE

SEVENTH EDITION



LONDON
JOHN MURRAY, ALBEMARLE STREET
1875

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BY THE SAME AUTHOR.

The APPLICATION of ARTILLERY in the FIELD,
2c. 2c. 8vo. 1819.

The EFFECT of HEAVY ORDNANCE directed against
and applied by Ships of War. 8vo. 1837.

A DISCUSSION on the PRESENT ARMAMENT of
the NAVY. 8vo. 1839.

ADVERTISEMENT

TO

THE SEVENTH EDITION.

SINCE the publication of the Sixth Edition of this treatise, the Queen's Regulations and Orders for the Army have been revised, and many alterations affecting the law and practice of Courts Martial have been made by them, and others by subsequent Mutiny Acts and Articles of War. The corrections required by these changes are now made in the work, and some recent statutes, and the cases bearing on the subjects of which it treats, so far as they have appeared in the authorized Law Reports, are also noticed; as are the General Orders, Army Circulars, Royal Warrants, and Orders in Council to the present date.

The argument in the note (*page 331*) as to the restricted sense in which the general terms of "The Indian Evidence Act, 1872," ought necessarily to be understood, became the subject of adverse criticism in India; but it will be seen that the principle of the freedom of the law of courts martial from interference by any local legislature, on which the writer had ventured to insist, has been very markedly asserted in an addition to the Mutiny Act of 1874. This

addition expressly refers to the Indian Act in question, and was occasioned by an interpretation having been acted upon by the military authorities in Bengal which extended its operation to Courts Martial, other than those held under the Indian Articles of War for the trial of Native officers and soldiers, to which alone it is legally applicable.

T. F. S.

8th May, 1875.

EDITOR'S PREFACE

TO

THE SIXTH EDITION.

THE Author, some months before his death in the year 1842, desired his eldest son to continue his work on the subject of Courts Martial. This he undertook to do with the sanction and encouragement of Lord Hill (the General Commanding in Chief), the late Lord Raglan (the Military Secretary), and the late Lord Hardinge, who was then Secretary at War; and now, looking back for more than thirty years, he desires to acknowledge that it is only by the necessary information having been supplied by every department to which he has had occasion to apply, that he has been able to bring out the several editions, from the third in 1843 to the present.

In the preparation of the fourth edition (1851) he had the advantage of information collected by his next brother, the late Major Egbert Simmons, 5th Fusiliers, then Deputy Judge Advocate at the Mauritius, and the Editor had hoped that he would have relieved him of the responsibility of future revisions. When there was an end to this hope (a), he had no heart to return to the work himself; but after the

(a) A fifth edition by Major Egbert Simmons was announced in 1857, but at that very time he was unexpectedly ordered on active service. In the absence of the Lieutenant Colonel, who had been appointed to a brigade shortly after the Fifth landed in India,

Major Simmons commanded the regiment during the whole of the operations, which were closed by the relief of Lucknow on the 25th September.

Major General Sir J. Outram, in his orders of the 26th September, speaks of the 5th Fusiliers as having "led the

book had been out of print for seven or eight years, he was induced to revise it in 1862, by the assurance of those whose position gave them a right to speak with authority, that great inconvenience was occasioned from the want of a new edition.

On the publication of the "*Queen's Regulations and Orders for the Army*," in 1868, the Editor had the honour to receive an interleaved copy of the new issue, accompanied by a letter from the Adjutant General, informing him that "His Royal Highness the Field Marshal, Commanding in Chief, recognising the efforts he had made in collecting the precedents, rules, and axioms which guide the administration of Military Law, had directed him to transmit" it "as a mark of consideration, in the hope it might be useful to him in any continued prosecution of his labours." It was a further encouragement to him to find not only that—unsought by him—the work was included in the number of those "recommended to the Army as useful books of reference," but also that paragraphs from it had been adopted in the text (b), and that nearly all the forms for recording "some of the more unusual incidents," which he had drawn up, had been transferred to the Form of Proceedings, then for the first time added to, and authorised by, the Queen's Regulations.

It was intended that the present edition should have been published early in 1869, but it was delayed in consequence

"column on the 25th instant under a "most murderous fire." Their loss was very heavy in this desperate struggle, but it was not until the 29th of September, that, in a successful sortie from the Residency—again to quote the gazette—"we had the misfortune to lose Major Simmons, who was killed by a musket-shot, whilst leading his men into the most advanced building." Sir James Outram, in his despatch of the following day, speaks of this operation as being "attended with the serious loss of one officer and fifteen men killed and missing, the officer killed, being Major Simmons, commanding Her Majesty's

"Fifth Fusiliers, most deeply regretted by the whole Army."—*London Gazette Extraordinary*, Feb. 17, 1868.

(b) In 1863 the Lords Commissioners of the Admiralty were pleased to apply for permission to issue extracts from the Author's remarks in the chapter on Courts of Enquiry, and the Circular (8th September, 1863) is now included in the "*Addenda to the Queen's Regulations and Admiralty Instructions*," 1868. Shorter extracts on the same subject were embodied in the "*Regulations for the Volunteer Force*," 1863, and in the "*Queen's Regulations and Orders for the Army*," 1868.

of an official intimation that very considerable changes were in contemplation. As the projected legislation did not take place, the Editor has now continued his revision with careful reference to the latest authorities, including the Acts of the last session of Parliament, the Orders in Council, Regulations and Warrants now in force, and the General Orders and Army Circulars to the present month inclusive.

The annual renewing of the Mutiny Act and Articles of War, and the occasional issue of subsidiary regulations, afford peculiar facilities for the improvement of Military Law; but this has at all times a tendency to render it especially fluctuating in its details, and the last ten years having been productive of more and greater changes than many longer periods in its history, many parts of this treatise have been re-written, and some brief notices have also been added on collateral points. If the Editor cannot hope that he has everywhere succeeded in adapting the following pages to the existing state of the Law and Practice of Courts Martial, he has at least the satisfaction of knowing that he has done his best to carry out his father's wish, that his work should continue to be useful to the Service.

DALTON HOLME, YORKSHIRE:

29th December, 1872.

AUTHOR'S PREFACE

TO

THE FIRST EDITION.

THAT it is expedient for officers of the army to make themselves acquainted with that system of laws, to which, as soldiers they are subject, is self-evident; that it is their duty, is obvious from a consideration of the nature and responsibility of the judicial functions which, in the course of their service, they are called on to discharge. The obligation is rendered still more imperative by the orders for the army, which expressly declare, that "The duties attached to officers on courts martial, are of the most grave and important nature; and, in order to discharge them with justice and propriety, it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, and to make themselves perfectly acquainted with all orders and regulations, and with the practices of military courts." By close and assiduous attention to the proceedings of Courts Martial, a sufficient fund of information may perhaps be collected; but individual observation is gradual and confined; and he, who relies solely on the result of his own experience, will, in *the meantime*, be often called to the exercise of functions, his knowledge of which cannot as yet

have attained much accuracy and consistence. Works on the practice of Courts Martial and on the subject of Military Law are therefore indispensable. Several do indeed exist, but they do not appear to have afforded all the information required by the army; nor are they, in all cases, immediately subservient to practical purposes, nor accommodated invariably to the existing state of the law, and to the general orders which have appeared on the subject within the last few years. Besides which, former publications on the subject are, in a great degree, rendered obsolete by the recent revision of the Mutiny Act and Articles of War.

Such are the considerations which led to the compilation of the following essay; and if, in its progress, the author has succeeded in obviating some difficulties attendant on acquiring the knowledge of the practice of Military Courts, and of the nature and extent of the power entrusted to them by the legislature, his principal object will be attained. Whatever may be thought of the manner in which he has executed his design, it will be admitted that what he had designed is by no means unimportant or uncalled for.

The Mutiny Act and Articles of War tend reciprocally to throw light on each other in cases which require elucidation, and where the ordinary rules for interpreting statutes are insufficient. But, in fixing the meaning of the Articles of War, where the pleasure of His Majesty has been expressed, it is decisive; and as the custom of the army can only have originated in orders, or have been adhered to under the sanction of the King; so must the opinion of His Majesty, as to the usage of the service, be received as equally conclusive. In this view, the author has attentively considered most of the orders, which have appeared since the accession of his late Royal Highness the Duke of York to the command of the army; an epoch ever memorable in the history of Great Britain, as being the commencement of that era, in which the British army has been as conspicuous amongst the armies of Europe for

discipline and tactics, as it has always been for patriotism and valour. If the few opinions which the author has ventured to offer on points which have been at times disputed, are not, in each case, supported by reference to a general order; as he believes them to have been inculcated by practice, so he hopes they will be recognised as in unison with the prevailing customs of the service.

In prosecution of the object of the present undertaking, it was found absolutely necessary to advert to the general rules of evidence in the common law courts of the country, and to the more prominent features of the criminal law of England, which, by the operation of the hundred and second(c) Article of War, Courts Martial have frequently to dispense in places beyond the seas, where there may be no form of British civil judicature in force. To this end, the author has consulted, with what attention he could, such works on evidence and jurisprudence as came within his reach. That his enquiries have been conducted with the judgment and exactness of a practised lawyer, he dares not flatter himself; and if he be charged with presumption, in attempting a subject confessedly beyond his grasp, his only plea must be that, in the discharge of his military duties, he felt it necessary to make some enquiries into the law of evidence and the criminal law of England; the result he arranged into the present form, and he is induced, by the observations of some brother officers, to offer it to the army; not by any means as a complete summary of all that may be requisite to be known on the subject; but as embracing the most obvious points, which, in the course of his reading, appeared to a soldier to be connected with, or to throw light on, the administration of Military Law; and which may be most required in cases where Courts Martial have to supply the place of courts of civil judicature.

If a good lawyer could be grafted on a soldier of common

observation, and possessing a certain experience in the army, a perfect treatise on Military Law might be produced; but as to the separate efforts of the lawyer and the soldier, it is to be apprehended that the *legal* faults which must exist in the essay of the one, would be more than equalled by the unmilitary feeling which would inevitably insinuate itself into and pervade the work of the other. Nor is it probable that these defects would be overcome by combining, in a joint treatise, the knowledge and experience of both: the precise research, which the lawyer may uninterruptedly pursue, ill accords with the desultory habits, which are unavoidable by the soldier; and the parts would be so incapable of amalgamation, that the work itself however valuable intrinsically, would yet be too discursive for the purpose of general information,—not readily made use of as a book of reference,—and consequently, as a practical work, of little utility. A perfect treatise on Military Law cannot, for these reasons, well be expected;—it would be necessary that acquirements should be combined which perhaps are in themselves incompatible and inconsistent.

The author is very far from supposing that his work will be free from errors and imperfections. He has no doubt but that, in its degree, it will tend to strengthen an opinion which has been entertained from the time of Tacitus;—“*Militaribus ingeniis subtilitatem deesse, quia castrensis jurisdictio, secuta et obtusior, ac plura manu agens, calliditatem fori non exercent.*” Yet he confesses that, if he anticipated severity of criticism, he should be much more solicitous as to the opinion which may be entertained of the military, than of the *legal* part of the work. Upon the one subject, he ought to be well-informed, or the experience of four-and-twenty years must have been indeed abortive; on the other, his information must be secondary; and if adequate to the duties of a British officer, and proportioned to the general knowledge required in an English gentleman, it is all that can be fairly expected.

Utility, not novelty, a practical compilation, rather than an original essay, being the object of the author, he has not scrupled to adopt whatever matter he could find applicable to his purpose. In every case, he has so far as he is aware, acknowledged the extent of the obligation; yet, as parts of this work were compiled from notes, made at different periods and without any view to publication, it is very possible that, in some instances, he has omitted to make due acknowledgment.

With respect to the manner and arrangement of this essay, imperfect as the author well knows it to be, if it be calculated to convey his meaning to the minds of those for whom it is intended, with tolerable distinctness, it is all that has been aimed at: it pretends neither to logical precision, nor to adventitious ornament. For the army the work was undertaken; and to the younger part of the army, the author fancies it may not be without its use; whether he is deceived or not, remains to be proved. One thing is very certain; if the essay be useful, it will ultimately need no apology; if not calculated to be of service, no apology can extenuate its defects; though, perhaps, integrity of motive may be received in palliation of the erroneous judgment which the author had formed of the utility of his performance.

18th September, 1830.

CONTENTS.

	PAGE
Advertisement	v
Editor's Preface—Sixth Edition	vii
Author's Preface—First Edition	x
Table of Contents	xv
Abbreviations used and Editions quoted	xix

CHAP.

I.	CONSTITUTION AND COMPOSITION OF COURTS MARTIAL	1-12
	Origin and name	1
	Present constitution and composition	4
 II.	 JURISDICTION OF COURTS MARTIAL	 13-40
	Ordinary for trial of military offences	13
	Enlarged for trial of criminal charges	14
	Extraordinary in execution of Martial law	15
	Limitation as to place, 17; ships of war, 18; time	21
	Offenders, ceasing to be in actual service, amenable to justice	22
	Persons subject to mutiny act	24
	Half-pay officers, 27; prisoners of war on parole	29
	Peers, members of parliament, 31; prisoners, &c., fol- lowers	32
	Supremacy of known laws of the land	34
	Questionable policy of subjecting soldiers to foreign law	38
 III.	 LAWS, RULES, REGULATIONS, AND CUSTOMS	 41-52
	The law of Courts Martial is the Queen's law	41
	Mutiny act not essential to <i>legal</i> existence of army	45
	Unrestricted power to make articles of war in force <i>abroad</i>	47
	Common and statute law guide courts martial when acting as courts of criminal judicature.	49
	And this in colonies governed by foreign law	51
 IV.	 MILITARY CRIMES AND PUNISHMENTS	 53-108
	Crimes defined and arranged	53
	Punishments for different ranks	54
	Crimes according to punishments—peremptory	61
	Capital, 76; <i>abroad</i> , 92; penal servitude, 94; fines	96
	Other crimes not capital	98

CHAP.		PAGE
V.	DISTINCTIVE JURISDICTION OF COURTS MARTIAL . . .	109-117
	Existing denominations of courts martial . . .	109
	Distinctive jurisdiction as to persons . . .	110
	Distinctive jurisdiction as to offences . . .	110
	Offences cognizable by a general court martial, 112; by a garrison court martial, 113; by a regimental court martial	113
	Extension by superior authority . . .	115
	On the line of march, and on board ship . . .	116
VI.	GENERAL AND DETACHMENT-GENERAL COURTS MARTIAL	118-122
VII.	DISTRICT OR GARRISON COURTS MARTIAL . . .	123-8
	Court for trial of warrant officers . . .	126
VIII.	REGIMENTAL AND DETACHMENT COURTS MARTIAL . . .	129-133
IX.	COURTS OF ENQUIRY . . .	134-145
	Formerly held by custom, now under Queen's Regulations . . .	134
	Held under articles of war . . .	142
	for doing justice to complaint of soldier . . .	142
	subject to appeal to general court martial . . .	143
	on soldier maimed or mutilated . . .	144
	to record illegal absence . . .	144
	Held by express order in the Queen's Regulations . . .	145
	Held under Volunteer act . . .	145
X.	PROCEEDINGS ON COMMISSION OF OFFENCES. SUMMARY Dis-	
	POSAL OF COMPLAINTS . . .	146-158
	Arrest imposed by junior officer . . .	149
	Duties of commanders of guards . . .	150
	Minor punishments by commanding officers . . .	153
	Appeal to a court martial . . .	154
	Redress of wrongs—officers, 155; soldiers . . .	157
XI.	PRELIMINARIES TO TRIAL BY COURT MARTIAL . . .	159-178
	Evidence, &c., enquired into before trial ordered . . .	160
	Framing the charges . . .	161
	Notice to prisoner . . .	173
	Order for assembly of court . . .	176
XII.	OF THE COURT AND ITS POWERS. PARTIES BEFORE THE	
	COURT. THE PROCEEDINGS . . .	179-209
	Contempts of court . . .	180
	Power to administer oaths and affirmations . . .	183
	Deliberation and responsibility of members . . .	190
	Judge Advocate, 194; prosecutor, 200; prisoner, 201; pro- fessional advisers, 202; interpreter . . .	203
	The proceedings . . .	205

CONTENTS.

xvii

CHAP.		PAGE
XIII.	ASSEMBLY OF COURT AND INCIDENTS ON ASSEMBLING	210-221
	Challenges and cause of challenge	213
XIV.	FORMATION, ADJOURNMENT, AND DISSOLUTION	222
XV.	OF THE TRIAL, AND ITS INCIDENTS	230-262
	Forms intended to secure English fair play	230
	Arraignment, 230; special pleas, 233; prosecution, 239; examination of witnesses, 240; objections to questions	241
	New procedure borrowed from ordinary assize courts, 244; defence, 245; evidence in reply, 257; prisoner's closing address, 260; reply, 260; summing up of judge advocate	261
	Prisoner still may have "last word" at minor courts	262
XVI.	JUDGMENT OF THE COURT	263-293
	FINDING—Equality of votes	264
	PROCEEDINGS BEFORE SENTENCE	271
	SENTENCE—Award and wording, &c.	275
	Recommendation to mercy	287
	Remarks by court	288
XVII.	DECISION UPON SENTENCE	294-313
	The confirming authority	294
	Royal pleasure, how received	297
	Revision	298
	Confirmation	303
	Proceedings set aside, and Royal pardon	303
	Mitigation and remission	304
	Commutation	305
	Promulgation	307
	Review of sentence	309
	Functions of judge advocate general	310
	Action of law against members and ministers	311
	Checks against abuse of power	312
XVIII.	EXECUTION OF SENTENCE	314-329
XIX.	OF EVIDENCE, AND THE GENERAL RULES OF EVIDENCE	330-361
	Notes—The Indian evidence act, 1872	331
XX.	ATTENDANCE OF WITNESSES, &c., EXPENSES, &c.	362-369
	Perjury and prevarication by witness	369
XXI.	COMPETENCY OF WITNESSES, AND EXCLUSION OF EVIDENCE	370-379
	Prisoners charged with joint or the same offences	371
XXII.	EXAMINATION OF WITNESSES	380-400
	Correction of testimony by witness	389
	Privilege in not answering	390
	Cross-examination of witnesses	393
XXIII.	ADMISSIONS AND CONFESSIONS	401-407
XXIV.	DOCUMENTARY OR WRITTEN EVIDENCE	408-421

CHAP.	PAGE
XXV. ON THE TRIAL OF CIVIL OFFENCES	422-486
Principals, accessories, and receivers	424
Treason, 424; Felony	428
Offences of a public nature	431
Unlawful assemblies and riots—suppression by troops	436
Offences against person, 446; against property	466

APPENDIX.

	PAGE
No. I. Warrant under sign manual,—General courts martial <i>at home</i>	486
II. Warrant under sign manual,—General courts martial <i>abroad</i>	487
III. Warrant under sign manual,—to commander-in-chief in India	488
IV. Warrant under sign manual,—to generals commanding the forces in the Presidencies in India	491
V. Warrant under sign manual,—District courts martial <i>at home</i>	493
VI. Warrant by general officer,—General or district courts martial	494
VII. Letters patent—Judge Advocate General	496
VIII. Deputation or Warrant—Deputy Judge Advocate (general)	497
IX. Deputation or Warrant—Deputy Judge Advocate (special)	498
X. Warrant—Officiating Judge Advocate, abroad	498
XI. Warrant—President, General court martial	499
XII. Summons to civil witness	499
XIII. PROCEEDINGS OF COURTS MARTIAL	500
Heading	500
Proffer and trial of challenge	501
Arraignment and plea	502
Prosecution, 503; Witnesses for prosecution	504
Adjournment and incidents on re-assembly	506
Incidents in examination of witnesses	506
Correction of recorded testimony	506
Defence, 507; Witnesses for defence	507
Reply	508
Finding	509
Proceedings before sentence	509
Sentence, 510; Signature of President	512
Revision	512
Confirmation	513
Approval of capital sentence by Civil Governor	513
Honourable acquittal	514
Recommendation to mercy and Remarks by Court	514
XIV. Warrant—General Courts Martial, Auxiliary Forces	514
XV. Judgment of Court of Error— <i>Dawkins v. Lord Rokeby</i>	516
INDEX, referring to numbered paragraphs	525

ABBREVIATIONS USED AND EDITIONS QUOTED.

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THE
CONSTITUTION AND PRACTICE
OF
COURTS MARTIAL.

CHAPTER I.

CONSTITUTION AND COMPOSITION OF COURTS MARTIAL.

I. COURTS MARTIAL, as now held in the British Army, have succeeded to the (1) name; and, so far as regards the land forces of the realm, for the most part to the jurisdiction of the marshal's court, or court-marshal (2) of our ancient military organization; but their existing constitution

Courts martial may be traced to the Court of the Marshal of England,

but his military jurisdiction dis-

(1) In the Latin of the parliament rolls in the time of King Henry IV. the marshal court was called "*curia militaris*" (the knights' court, or court of the chivalry), from *miles*, chevalier or knight. The change to "martial" (*) points to men who had heard more of the gods of ancient Rome than of the dignities of feudal England; and the same false etymology (*Mars, Martialis*), which has misled even judges and counsel learned in the law, affected the spelling of "marshal law," "judge marshal," and "provost marshal." This last appears as "provost martial" so late as the Articles of William III. and Queen Anne, [§ 156]; and, on the other hand, "martial law" may be

found as early as 1547 in the letters patent of Sir Anthony St. Leger as Lord Deputy of Ireland—" *secundum legem et consuetudinem Marescalciæ . . . (vocatam, martial Law)*"—*Rymer*, xx. 148. But in a similar commission to the same in 1550 the explanatory parenthesis reads "Marshall Laws" (*ib.* 244), and the letters patent of the judge advocate general [§ 1279] still style him "judge marshal of all our forces." See § 100*n*.

(2) See Coke, 4 Inst. c. 17. "This court is the fountain of the marshall law." "They proceed according to the customes and usages of that court, and in cases omitted according to the civil law, *secundum legem armorum*."

* In the commission under the great seal constituting Algernon, Earl of Northumberland, captain-general of the army (14th Feb. 1640), he is authorized, among other things, to hold "military, or marshal, or martial courts."—*Rymer*, xx. 369.

appeared with the breaking up of the feudal system.

Their composition was changed in the time of King Charles I., and became more analogous to that of the ordinary courts of civil judicature,

after the example of the standing armies of Northern Europe; and

according as they are General or Regimental courts martial.

Formerly the sovereign constituted courts martial by an exercise of prerogative,

is essentially different. Instead of a judge sitting alone, or with a single (3) assessor, their modern form, which ensures the benefits of trial by jury, had been already established at the beginning of the civil war of the great rebellion. This fundamental change may very possibly have recommended itself from the greater resemblance to the criminal system of the common law, but it was most probably adopted from the "Articles and Military Laws" of Gustavus Adolphus, (4) and the military jurisprudence of Germany and the Low Countries, (5) where many of the principal commanders of the contending armies had gained their professional experience, and their knowledge of the "custom of war," which regulated their military tribunals. The court also no longer consists of the senior officers available for the duty, as then in the army, and as is still the rule at naval courts martial; but from that time to the present—at least until the year 1829, when district or garrison courts martial were introduced into the service—courts martial have continued to be held with a two-fold distinction of jurisdiction and powers according as they are convened by the commander of the army, or, under his authority, by the commander of a regiment, garrison, or distinct detachment, and as they are composed of officers drawn from their respective commands.

2. These courts formerly derived their authority exclusively from the crown, in right of the supreme government of the army, [§ 81] and for the first time received a statutory recognition at the Revolution of 1688. (6) Although recourse was then had to parliament for more ample powers

(3) The marshal sat in person, or a "sufficient deputy" under his commission, as in other instances under the commission of the general of the army. The judge marshal was not only "advocate and coadjutor to the marshal" as in 1644, and called in (§ 29ⁿ) to advise on legal points, as now, but also sat as judge by himself "doing justice" in the case of "auctours of offences."—Sutcliffe, *Laws of Warre* (1593), 339.

(4) These are printed at length in Ward's "*Animadversions of Warre*, Dedicated to his Royall Majestie King Charles" (1639) II. 41-54. The direction (*Art.* 144) that the members of the courts marshal should be sworn "under the blue skies" is racy of their

old world Scandinavian origin.

(5) It is curious to note the length of time during which foreign military law was recognized as authority in the British service. The Dutch "*Laws and Ordinances touching Military Discipline*," decreed at Arnheim on the 13th August, 1590, by the Council of State, as printed in English at the Hague, were reprinted by an order in council, together with the Scotch Articles, printed by order of King Charles II., when they were "altered and amended" in 1691.

(6) The first mutiny act (1 Will. & Mary, c. 5) was passed the 3rd April, 1689, and became in force on the 12th April.

than were known to the common law, the act then passed, and many other mutiny acts were afterwards allowed to expire, courts martial the meantime depending only on custom and the power of the crown to establish articles of war. [§91] In a series (7) of the earlier mutiny acts there was a special clause which expressly provided that neither "the acts nor anything contained in them should extend to abridge" this branch of the royal prerogative, so far as it might prevail beyond the seas; and, with reference to the same constitutional principle, the mutiny act, which from the year 1718 has declared the lawfulness of articles of war made by the crown in accordance with its provisions, still limits the restriction in respect to capital punishment to the case of persons within the United Kingdom. (8) An analogous distinction is also indirectly preserved in the terms in which the mutiny act declares the powers of the crown: it enacts (9) that Her Majesty "may, from time to time, in like manner as has been heretofore used, grant commissions under the royal sign manual, for the holding courts martial *within* the United Kingdom of Great Britain and Ireland," but is silent in respect to commissions granted to hold courts martial *elsewhere* out of the same. The mutiny act is now also silent as to the composition of general and district or garrison courts martial held out of the British Isles, which is regulated by the sovereign in the articles of war. Besides the general power of granting commissions "to hold courts martial," the mutiny act, in the sequel of the declaration referred to above, declares the power of Her Majesty to "grant commissions or warrants under the royal sign manual to the chief governor or governors of Ireland, the commander of the forces, or the person or persons commanding in chief, or commanding for the time being, any body of troops at home or abroad," "for convening courts martial" themselves, and also for authorizing officers "under their respective commands to convene courts martial," with this limitation, "that the officer so authorized be not below the degree of a field officer, except in detached situations beyond seas where a field

and framed all the laws for the government of the army, but

this power of the crown has been since abridged within the realm, although

recognized out of the same;

the sovereign now constituting courts martial by statute,

issuing warrants for convening courts martial,

directly and mediately,

with a limitation as to rank;

(7) 1 Anne, c. 16, s. 37; 2 & 3 Anne, c. 20, s. 37; 3 & 4 Anne, c. 16, s. 38, &c. Compare 12 Anne, c. 13 (*al. c.* 12), s. 43; 13 Anne, c. 4, s. 41, &c. (8) M.A.1. See §10, 39. 4 Geo. 1, c. 3, 40. (9) M.A.6. In the mutiny acts of 1850, 1849, &c., "Be it declared and enacted."

officer is not in command, in which case a captain may be authorized to convene district or garrison courts martial. (1)

and granting
powers to hold

3. The provisions of the mutiny act at first extended only to those courts martial which were held for the trial of the offences therein declared liable to capital punishment, leaving the composition of these courts in other cases, and the forms of procedure, to be regulated by the custom of war, and the royal prerogative as expressed in the articles of war. The authority for convening *all* courts martial of inferior jurisdiction continued to be derived only from the royal prerogative, or the general power of making articles of war. Even in the present day,—when *all* general courts martial, and the more recently created district or garrison courts martial, are placed on the same footing as to their constitution,—the mutiny act, though it decrees certain powers to regimental and detachment courts martial, and regulates their composition, is nevertheless altogether silent as to the mode of their assembly. The articles of war expressly convey Her Majesty's command for the holding of regimental (2) courts martial "by the appointment of the colonel or other commanding officer" ("not under the rank of captain") "without other authority than these our rules and articles of war;" and for holding detachment courts martial, (3) also without other authority, by the appointment of the senior officer not being under the rank of captain, or, if on board ship, "whatever be his rank."

certain courts
of inferior juris-
diction

without other
authority than
the articles of
war;

and irrespective
of the limitation
as to rank ap-
plying to the
convening of
superior courts.

The mutiny act
legalizes the con-
vening of courts
martial in cer-
tain cases beyond
seas, without
other authority
from Her Ma-
jesty.

4. The earlier mutiny acts authorized the general of the army, equally with the crown, "to grant commissions" to assemble courts martial; and in the present day, the mutiny act, besides courts martial assembled by further authority of the sovereign, either direct or delegated, makes it "lawful" in special cases beyond the seas for any officer to convene a detachment general court martial, [§ 278] to which it assigns the same powers in regard to sentence upon offenders as are *granted* by the act to general courts martial. And Her Majesty's pleasure is expressed in the articles of war, that a court of this description may be assembled by any officer,

(1) M.A.6. This section has, since 1866, contained a provision that the officer so authorized to convene courts martial, may confirm the same, accord-
ing to the terms of his warrant.
(2) A.W.112.
(3) A.W.113.

notwithstanding he "shall not have received any warrant empowering him to assemble courts martial." (4)

5. Under the provisions of "The Regulation of the Forces Act, 1871," the Queen issues warrants to general or other officers commanding districts to convene courts martial for the trial of militia, yeomanry, and volunteers, according to the several statutes relating to them; (5) and under "The Volunteer Act, 1863," to a secretary of state, to assemble courts martial for the trial of the volunteer permanent staff, when not on actual military service.

Courts martial
for the trial of
volunteer permanent
staff.

6. Courts martial for the trial of native officers, soldiers, and followers of the Indian army, are held under the articles of war framed by the government of India for such native troops. [§58] In the Irregular corps and Sikh and other levies, paramount authority is lodged in the hands of commanding officers, who exercise judicial powers either directly or by means of punchayats, or native military tribunals, and this "established usage of the service" has been recognized in the (6) Mutiny Act of 1863, and subsequent years.

Military courts
for native troops,
regular and
irregular.

7. In conformity with the power declared in the mutiny act, warrants under the sign manual, countersigned by a secretary of state, are annually issued to generals in command in India and elsewhere abroad, empowering them to convene courts martial, general, and district or garrison, (7) and to delegate these powers to other officers, not under field officers, having the command of a body of the forces; also to appoint provost marshals and a judge advocate at any court martial, in the event of there not being one appointed by Her Majesty, or deputed by the judge advocate general, and now not only in India, but also at other foreign stations, to delegate these powers in respect to judge advocates and provost marshals. Each year there also issued to the general or other officers commanding districts at home, and to the governor or officer commanding for the time being at Guernsey and Jersey, warrants to convene general courts martial, (8) but not to delegate that power, nor to appoint a judge advo-

Warrants for
convening
courts martial
abroad,

at home.

(4) M.A.12. A.W.107. The 101st section of the mutiny act, as to the trial of criminal offences in India, authorizes the appointment of general courts martial by the commanders in chief, but, as a matter of fact, they hold warrants for assembling courts martial under the sign manual, ex-

pressly authorizing them (§1260, 1265) to appoint courts martial for the trial of these crimes.

(5) App. XIV; Circ. 29 Nov. 1873.

(6) M.A.1 (last clause). I.A.W. Part I. f.

(7) Appendix II., III., IV.

(8) Appendix I.

WARRANTS.

cate, and also warrants, to convene district or garrison (9) courts martial, and to delegate this power under certain restrictions.

on special
occasions :

8. On particular occasions, special warrants have been issued under the sign manual for the trial of persons named in the warrant, and on charges therein recited.

under former
act, continue
in force under
existing act ;

9. Warrants for holding courts martial under a former mutiny act remain in force under the existing mutiny act ; and proceedings of any court martial upon any trial, begun under the authority of a former act, are not discontinued by the expiration of the same. (1) This provision was introduced into the mutiny act in 1760, upon occasion of the trial of Lord George Sackville. The mutiny act expired during the trial, and a new warrant being thereupon issued, it was deemed necessary, on the opinion of the attorney and solicitor general, that the proceedings should commence *de novo*, the court and witnesses being sworn (2) again.

extend beyond
the limits of
command,

10. The operation of the warrant formerly addressed to an officer in command, was, by the terms of it, restricted to *the limits of the command*: a special warrant under the sign manual was therefore indispensable to the assembling of a general court martial for the trial of an officer or soldier, charged with an offence committed within the precincts of a command distinct from that to which he may have come, or have been removed, subsequent to the offence. A court, (3) the proceedings of which were approved by the King, declined to enter into the examination of a charge, upon the express grounds that it appeared to have arisen out of the limits of the command of the general who convened it: but the restrictive clause in the warrants was omitted in the year 1830, and the mutiny act was altered to correspond in 1834. It now declares (4) that a person subject to it, who shall in any part of Her Majesty's dominions or elsewhere commit any of the offences for which he may be liable to be tried by courts martial, by virtue of the mutiny act, or articles of war, may be tried and punished for the same in any part of Her Majesty's dominions or elsewhere, where he may have come or be after the commission of the offence, as if the offence had been committed where such trial shall take place. [§ 41]

whether it be
abroad or at
home ; but

punishment
limited at home
by the mutiny
act, which does

(9) Appendix V.

(1) M.A. 97.

(2) Printed Trial, p. 213.

(3) Court martial on Lieutenant John Read, September 1790.

(4) M.A. 6.

This provision has since 1866, in a great measure, lost its significance, the distinction therein referred to, and expressly provided in the first section of the mutiny act, [§2, 38, 39] between persons serving within, and out of, the United Kingdom being no longer kept up in the articles of war. Her Majesty, by an alteration in the hundred and eighty-ninth article, in that year was pleased to suspend the action of her royal prerogative of framing articles to be in force in foreign parts, and to direct that "no person subject to the mutiny act shall be sentenced to suffer any punishment extending to life or limb, or to be kept in penal servitude, by virtue of the articles of war, except for such crimes as are expressly declared by the mutiny act to be so punishable."

not affect the royal prerogative, as it may be exercised beyond the seas,

and limited in all cases, at home or abroad, by the articles of war, to the punishments expressly provided in the mutiny act.

11. In consequence of the conflicting opinions which had been given in India, respecting the authority by which courts martial could be appointed and convened, and the sentences confirmed, an act of parliament (5) was passed in 1844, which, extending only to the East Indies, enacts that an offender, whether belonging to the Queen's troops, or to the [then] Company's European or native troops, may be tried by a court martial, appointed or convened by any officer under whose actual command he may be serving, or within the local limits of whose command he may come, without reference to the authority from which that officer derives his power of convening courts martial; provided only that he *has* lawful authority to convene courts martial for the trial of *any* of the troops under his command.

Warrants must be specific and by the Queen, except in India,

where, if granted for any portion of the army in that country,

they are extended to the whole, by

stat. 7 Vict. c. 18, or "Courts Martial Act."

12. Courts martial are composed exclusively of "commissioned officers;" (6) and those on general courts martial must moreover, since 1868, have held a commission for three years before the assembly of the court. (7) All

Courts martial composed of commissioned officers,

(5) This Act remains in force, so far as it is applicable, notwithstanding the repeal of the East India Company Mutiny Act.—26 & 27 Vict. c. 48, s. 3.

(6) Officers on joining are required to attend all courts martial for at least six months. They remain in court throughout the proceedings, under an oath of secrecy, [§ 440] "but they are not to be nominated members of courts

martial until the commanding officer deems them perfectly competent to perform so important a duty."—Q.R. S.6, p. 48. See § 23a.

(7) M.A.8, A.W.106. In the reign of James II. no officer below the rank of captain was eligible as a member, so long as seven officers, the number then requisite to form a court martial, could be brought together.* At

* "An Abridgment of the English Military Discipline. Printed by Especial Command for the Use of His Majesty's Forces" (1686), p. 271.

under certain
restrictions,

as to staff
officers of
pensioners

and non-com-
batants.

Regimental
staff.

Commissaries.

Numbers,

minimum fixed,

often exceeded.

commissioned officers of the army, on full pay; all officers on the general staff of the army, in the receipt of full pay on the staff, though on the half pay of their regimental rank; and all officers holding rank in the army by brevet, even if on the half pay of their regimental rank, are eligible as members of courts martial. Staff officers of pensioners are not to be called upon except in case of emergency, and not in any case whatever in which it would interfere with their pay days or musters. (8) Paymasters are specially exempt from regimental duty, although having rank in the army, and are prohibited from assuming any military command. Instances however may be quoted, where paymasters and also surgeons, assistant surgeons, and quarter masters have been required to perform this duty; but the custom and convenience of the service forbid recourse being had to these regimental staff officers, except in urgent circumstances, notwithstanding that, in the performance of their duties, these officers "become acquainted with the rules that apply to military subordination and discipline." It was held that commissariat officers, having the Queen's commission, were within the terms of the mutiny act; but it was obvious "from the nature of their avocations," that notwithstanding their liability to this duty, they should never be summoned to perform it "except in extreme cases." (9)

13. The number of commissioned officers required for courts martial varies with each denomination, and according to the part of the world in which they may be assembled.

14. The minimum in each case appointed is absolute, except for regimental and detachment courts martial, when the impracticability of assembling the number justifies the convening officer in diminishing it. [§ 310n] A number exceeding that prescribed is usually sworn on general courts martial, to guard against the contingencies which may arise from death and sickness; and generally an odd number is

this time, the governor or colonel was president, and the court consisted of the captains in the regiment or garrison, in which the court was held. Courts martial, held under the first mutiny act, were composed of thirteen officers, "whereof none under the degree of captain" (1 Will. & Mary, c. 5, s. 4), but this in the following mutiny

act (1 Will. & Mary, sess. 2, c. 4, s. 3) became "whereof none under the degree of commission officers, and this provision was not again altered until this change in 1868.

(8) Circ. Mem., Horse Guards, 9th March, 1844.

(9) Treasury letter, No. 754, 22nd December, 1840.

preferred, but this is by no means necessary, nor does it seem particularly desirable. [§ 526]

15. Of this number of members one is styled president. President. He is nominated either by the warrant or by the appointment in orders of the authority convening the court, or under the authority of the officer convening the court—as by the officer commanding the troops at the station where the court may be assembled. He is necessarily the senior combatant officer, when the court is sworn, [§ 491] the relative and honorary rank of officers of the regimental staff or civil departments not entitling them to the presidency of courts martial. (1)

16. The president can in no case be the confirming officer, nor the officer whose duty it has been to investigate the charges on which the prisoner is arraigned; but in the case of a detachment general court martial, the convening officer may be the president. (2) Where courts martial arise out of disputes between different corps, the president is taken by turns from the several corps according to their rank. (3)

17. The articles of war also require that in the case of a general court martial, or of a district court martial for the trial of a warrant officer, the president shall not be under the degree of a field officer, unless a field officer can not be had; nor in any case whatever under the degree of a captain, save in the case of a detachment general court martial, or a regimental or detachment court martial held on the line of march, or on board any ship, not in commission, or at any place where a captain cannot be had. (4) The Queen's Regulations moreover direct that, whenever general officers or colonels are available as presidents of a general court martial, no officer of inferior rank is to be placed on that duty. (5)

18. The rank also of the other members is in certain cases dependent on that of the prisoners to be tried: no field officer can be tried by any person under the rank of captain; (6) and at the trial of a warrant officer by a district court martial, no more than two of the members can be under the rank of captain. (7)

19. In addition to these provisions by the articles of war, For the trial of all officers to be

(1) R.W.111.

(2) A.W.114.

(3) A.W.148.

(4) A.W.114.

(5) Q.R.S.6.p.54.

(6) A.W.106.

(7) A.W.111.

composed of officers of equal, if not of superior, rank, when practicable :

the Queen's Regulations (8) lay down that " Whenever it can be arranged without serious inconvenience to the service, the members of the court martial assembled for the trial of an officer are to be of equal, if not superior, rank to the prisoner ; and in no case, but one of necessity, is a colonel to sit upon the trial of a general officer, or a captain on that of a field officer, or a subaltern officer on that of a captain. On the trial of subaltern officers, two officers of that rank are considered a sufficient proportion to be detailed as members of the court. The members of a court may however be of any rank superior to that of the prisoner."

Commanding officers to be tried by officers who have held commands.

20. " When the commanding officer of a corps is brought to trial, care is to be taken that as many members of the court as possible shall be officers who have themselves held, or who are holding, commands equivalent to that held by the (9) prisoner."

Detail of officers for court martial duty by roster to secure impartiality.

21. The duty of courts martial, as of all other duties, is by roster. The Queen's Regulations point out the order in which this duty is to be detailed, after that of " Duties under arms," (1) and as Her Majesty therein directs that " the tour of duty shall be from the senior downwards," it precludes the possibility, without a glaring breach of the express orders of the sovereign, of selecting or packing a court martial ; or rather, it is a means of anticipating or excluding animadversions and insinuations, having a tendency to impeach the composition of courts martial.

Officers of the army, or Indian service, or marines, may be associated on courts martial.

22. Where it is necessary or expedient, a court martial, composed exclusively of officers of the army, or of officers of the Royal Marines, or of officers of both those services, whether the commanding officer by whose order such court martial is assembled belongs to the land or marine forces, may try a person belonging to either of these services. (2)

(8) Q.R.S.6.p.55.

(9) Q.R.S.6.p.56.

(1) Q.R.S.8.p.2. The general courts martial held in Jamaica for the trial of Ensign Cullen and Staff-Assistant-Surgeon Morris, though convened by the general commanding on the spot, were composed of officers sent there expressly for this duty, and the judge advocate received a warrant from the judge advocate general, as it was thought desirable that the constitution

of the court should not be exposed to the imputation of partisanship, which might have been the case if it had been composed of officers who were serving in the island at the time of the transactions, which were the subject of enquiry.

(2) A.W.146. M.A.W.127. The special provisions as to the composition of the court for trials in the Indian army were left out in the mutiny act of 1868.

23. Officers of the regular forces and of the militia cannot be associated together on courts martial for the trial of an officer or soldier in either service. (3) This has not been held to prevent the association, on courts martial, of officers of regulars, and of militia or other forces actually embodied and doing duty in the colonies in time of actual invasion, or during the proclamation of martial law: (4) and the Act 36 & 37 Vict. c. 68, s. 3, enacts: "Militia recruits shall, during the period of their recruit training, when the militia battalions to which they belong are not for the time being out for training or exercise, be subject to the command of such officers, whether of the militia or the regular forces, as may from time to time be appointed to serve with the force with which such recruits are being trained, and the officers in this section mentioned shall be competent to sit on any court martial appointed for the trial of any such recruit, for an offence committed by him during the period of his recruit training." (5) The hundred and fifty-first article of war of 1874 excepted this case from its general provision, and also that of officers and soldiers of the permanent staff, and those attached to a body of regular troops, [§ 59] in which cases "officers of the regular forces shall be competent to sit upon courts martial in the same manner as officers of the militia."

Officers of regulars and militia cannot be associated on courts martial,

except colonial militia in time of actual invasion or under martial law; and except for the trial of militia recruits, and other persons in the militia receiving pay [M.A.(1875)2]

during their recruit training, now designated preliminary training;

and permanent staff, and militia attached for instruction or otherwise to the regular forces.

24. Regimental courts martial are in all cases composed of officers of the corps in which they may be held, or of any portion of a regiment or battalion, which may be attached to it. (6) Other courts martial, excepting only when a district court martial is held for the trial of a warrant officer, [§ 304] may be composed of officers of any corps, but the articles of war contain special provisions as to the mixture of officers in several special cases.

Special provisions as to mixture of officers.

25. Officers and soldiers of the Life and Horse Guards, for differences arising purely among themselves, or for crimes

Association of officers on courts martial in the

(3) A.W.151. See § 58.

(4) A well-known instance is supplied by the trial of the Rev. J. Smith, a missionary in Demerara, in 1822. A similar practice was expressly provided for by the acts of parliament for the trial by courts martial of offenders in Ireland subsequently to the rebellion in 1798.

(6) "Militia officers doing duty in the sub-district in which a court mar-

tial on a militia recruit may be held" [other than a general court martial, § 12] "may serve upon such court martial, provided they have served one training and have passed the examination prescribed for subalterns of the militia, and have obtained the required certificate."—M.O.(1875)46. See M.A. 2, post § 59.

(6) A.W.112.

household
brigade ;

in the three
regiments of
Foot Guards ;

when different
corps are
interested ;

when the
household troops
are on detached
duty.

Courts martial
in the artillery.

relating to discipline or breach of orders, are tried by officers serving in any or all of those corps. (1)

26. Officers of the regiments of Foot Guards, for similar purposes, form courts martial, (2) and take rank according to the dates of their regimental commissions. (3)

27. Courts martial, arising out of disputes between different corps, whether of the household troops or of the other forces, are composed, in equal proportions, of officers belonging to the corps in which the parties complaining and complained of do then serve, the president being taken by turns as nearly as the convenience of the service may admit, and in the order of the seniority of the corps concerned. (4)

28. When any proportion of the household brigade or the guards are detached, courts martial for the trial of officers and soldiers of these corps may be composed of officers of different corps ; but at least one-half of the officers composing the court must be taken from the corps to which the prisoner may belong, if so many can be conveniently assembled. (5)

29. Officers of artillery for differences arising amongst themselves, or in matters relating solely to their own corps, have courts martial composed of their own officers ; but when a sufficient number of such officers cannot be assembled, or in matters wherein other corps are interested, the courts are composed of officers of artillery and of other corps indifferently. (6)

(1) A.W.147.

(2) A.W.147.

(3) A.W.183.

(4) A.W.148.

(5) A.W.149.

(6) A.W.150. The Statutes and Ordinances for the War, set forth by King Henry VIII. in the year 1544, make provision "for Justice within the Retinue of the Ordnance" (*Art.*

36), that robbery, manslaughter, and "questions among themselves" should be judged and punished by "the master of ordnance, and such as he shall call to him," [§ 18] but with the right of appeal before the marshal. In all cases between them and other persons of the army, they were to abide the judgment of the marshal and his court.

CHAPTER II.

JURISDICTION OF COURTS MARTIAL.

30. THE ordinary jurisdiction of courts martial extends to the cognizance of offences, declared by or under the powers of the mutiny act, committed either at home or abroad, upon land or upon the sea ; (1) and charged against persons who are subject to the mutiny act, [§ 58] or who within the time [§ 52] specially limited by the law, were subject to the act, the offences so charged being offences declared by the acts and articles in force at the date of their alleged commission. The penalties, however, depend on the place where, and the rank of the person by whom, the offences may have been committed, and vary also according to the powers of the court by which they may be awarded.

Jurisdiction.

Specific for trial of offences to the prejudice of good order and military discipline,

31. Courts martial are also available for the purpose of enquiring into matters which may be brought before them, although no prisoner may be on his trial. (2)

and for judicial enquiries.

32. Their ordinary jurisdiction is not only for the trial of purely military offences, of which the civil judicature takes no cognizance ; or for the trial of offences to the prejudice of good order and military discipline, which are punishable at common law as misdemeanours, felony, or treason, and are subject to more exemplary punishment by their award ; but it is also, to a certain extent, concurrent with that of the ordinary criminal courts. Inasmuch, however, as every officer or soldier accused of felony or misdemeanour, or any crime or offence—other than those mentioned in the mutiny act, (3)—is liable, on application being made for that pur-

Concurrent with civil judicature ;

subordinate, or

(1) M.A.15. The ordinary jurisdiction of courts martial is suspended on board men-of-war in commission ; but they are competent to take cognizance of offences committed by officers and soldiers on board Her Majesty's ships after their disembarkation, or removal

to a transport or ship not in commission, or during a temporary landing in the Queen's dominions, or the territories of a foreign state.—See § 42, 48n.

(2) A.W.13, 112, 147, 148, 150, 171. See § 317.

(3) M.A.40, 76.

at the option
of military
authority,

but extended to
treason and all
offences against
known laws
of the land ;

is enlarged in
the field.

Followers.

Aliens and
vagrabonds.

pose, to be delivered over to the civil magistrate, this concurrent jurisdiction of courts martial is wholly subordinate to that of the civil courts, with the one exception created by the mutiny act, (4) which provides that the trial of an attested recruit in some cases may be either before two justices or before a district or garrison court martial, "at the discretion of the military authorities."

33. The ordinary jurisdiction of courts martial is enlarged beyond the seas, in default of a competent civil judicature, and in India at a distance of one hundred and twenty miles from the presidency cities, and then extends to the exclusive trial of military persons for civil offences, for which, with the exceptions recognized or expressly declared by the mutiny act, they are not otherwise amenable to courts martial, (5) except in so far as not being capital crimes they are to the prejudice of good order and military discipline ; or else, in the case of an officer, involve "*scandalous* behaviour unbecoming the character of an officer and a gentleman," or, in the case of a soldier, constitute "a charge of disgraceful conduct."

34. In the field all followers and retainers of the army become subject to the restraint of military law ; [§73] and the custom of war and the necessity of the case then also justifies the punishment, by sentence of court martial, of certain crimes against the safety of the army, or the person or the property of individuals belonging to it or entitled to its protection, when the offenders themselves neither belong to nor are connected with the service.

(4) M.A.48.

(5) Officers and soldiers acquitted or convicted by the civil magistrate or by the verdict of a jury, are not (M.A. 39) liable to be tried for the same crime or offence by a court martial. Officers were liable under the mutiny act of 1846 and previous years, but not to be punished otherwise than by *cashiering*.

The want of power to reduce by court martial, a non-commissioned officer who may commit an offence, rendering him wholly unfit for his situation, and who, after undergoing the sentence of the civil power, may be returned to his regiment, and continue to retain his rank, pending a reference to the commander in chief. (Q.R.S.23,p.34) is felt as a practical

inconvenience on a distant station.

No opinion is offered as to whether it might or might not have been advantageous to retain the power of having recourse to a court martial to award the punishment of cashiering, in those cases where the honour of the army might be affected ; but it may be observed that the mutiny act, as it now stands, seems to restrict Her Majesty to the one alternative of cashiering, in those cases where she may see fit to remove any officer from the service for an offence, which may have been disposed of by the civil power. Nor is this limitation affected by the twenty-fifth section, which applies to the commutation of "a sentence of cashiering."

35. The declaration of marshal law, or—as modern usage [§ 1*n*] prefers to write it—of martial law, extends its operation to persons not within the provisions of the mutiny act, and subjects the whole population of the proclaimed district to orders according to the rules and discipline of war, and renders all persons amenable to courts martial, [§ 100] on the order of the military authority, and so long as the civil judicature is not in force. There is also a modified exercise of martial law when, by special intervention of the authority exercising the supreme legislative (6) power, courts martial have been erected into tribunals for the trial of persons, not otherwise subject to military law, for certain specified offences, notwithstanding that the ordinary course of law may have been partially restored, or may never have been altogether stayed.

JURISDICTION OF COURTS MARTIAL is paramount, superseding all civil process during the suspension of ordinary law by martial law,

or concurrent with the civil courts when they are open by a special law or ordinance, after the recall of the proclamation.

36. The preamble of each successive mutiny act, from the first year of the reign of Queen Anne downward, has reasserted the illegality of martial law in time of peace, by declaring that “no man can be forejudged of life or limb, or “subjected *in time of peace* to any kind of punishment “within this realm by martial law,”—the words “in time of peace” having been then first added to the form in which the Petition of Right had been embodied in the first mutiny act and the subsequent mutiny acts in the reign of William III. Not only, therefore, does the mutiny act regulate “martial law” as it is used in the standing army, but the preamble indirectly recognizes the legality of resorting to this expedient in time of war and rebellion or such armed rising [§ 1069] as is levying war against the Crown. No legal dogma can be clearer, and being each year recognized by parliament, it is entitled to all the deference which may be due to an act of the legislature so repeatedly revised and

The declaration that martial law is unconstitutional in time of peace

(6) As instances of special laws creating this exceptional jurisdiction, may be mentioned the statute [Ir.] 39 Geo. 3, c. 11, passed in Ireland in 1798, which was revived by the Irish act, 40 Geo. 3, c. 2, and further continued by 41 Geo. 3, c. 14 [U. K.]; the statute 43 Geo. 3, c. 117, which was passed in the Imperial Parliament in 1803, re-enacting the principal provisions of that before mentioned; and the Ordinance [Canada], 2 Vict. c. 3, passed in Canada in 1838. These acts authorize the exercise of the

powers which they confer on the executive, “whether the ordinary courts shall or shall not be open,” and do not lay down any deviation from the ordinary manner of proceeding in the case of courts martial held under them. The Irish Coercion Act, passed in 1833 (3 & 4 Will. 4, c. 4), regulated the rank of the members, the punishments to be awarded, and, among other peculiar enactments, provided (sec. 14) that the parties before the court might have the assistance of counsel and attorneys.

does not go to abridge the acknowledged prerogative of the sovereign in case of necessity.

considered. The legal right, or, more properly, the power of the sovereign or the representative of majesty to exercise the acknowledged prerogative of the crown to resort to the exercise of martial law against open enemies or traitors is expressly declared in several earlier statutes, and also, among more recent statutes, in the Irish disturbance act (7) of 1833. It is not, however, here necessary to descant on Her Majesty's undoubted prerogative to punish rebels or other enemies in arms against her, though within the realm, by the aid of courts martial: the object in this place is to ascertain that part only of martial law which is commonly designated the law military, and is administered by courts martial for the government of the army in pursuance of the mutiny act and articles of war in conformity therewith.

Specific jurisdiction

as to offences

declared by Her Majesty in the articles of war.

Offences punishable within the United Kingdom capitally or by penal servitude restricted to those expressed to be so punishable by the mutiny act.

Such restriction

37. The mutiny act, after the above [§36] recital, goes on to recite that it is requisite for the preservation of discipline and the more prompt punishment of offences to the prejudice of good order and military discipline than the usual forms of the law will allow, and provides for the cognizance of crime in the army, by establishing the legality of articles of war made by Her Majesty for the government of her forces, and requiring them to be judicially noticed by all judges, and in all courts whatsoever.

38. The mutiny act, however, limits the penalties to be declared by such articles, since no persons "within the United Kingdom of Great Britain and Ireland, or the British Isles," can be subjected by them "to suffer any punishment extending to life or limb, to be kept in penal servitude except for crimes which are, by the mutiny act, expressly made liable to such punishments," nor in any manner, with respect to such crimes, which does not accord with its provisions. (8)

39. It may be observed that this limitation, which was

(7) The 3 & 4 Will. 4, c. 4, s. 40 declares that nothing in this act contained shall be construed to "take away, abridge, or diminish the undoubted prerogative of His Majesty for the public safety, to resort to the exercise of martial law against open enemies or traitors."

(8) M.A.I. Sec. 15 specifies the offences punishable by death, and by sec. 17 embezzlement is made liable to penal servitude.

Until the mutiny act was remodelled in 1860, it enabled a court martial, "by which any soldier shall have been tried and convicted of any offence punishable with death," whenever the offence was not thought "deserving of capital punishment," to award penal servitude; and this discretion is now extended to the case of any offender by the express mention of "penal servitude" in section 15.

first inserted in 1748, by its express terms, does not affect Her Majesty's prerogative, in respect to legislating for her armies in foreign parts; and the penalties of death and penal servitude are still annexed to crimes (not expressed in the mutiny act) by the fifty-third and three following, and the fifty-eighth articles of war. It had been supposed that the limitation was not intended to apply within the United Kingdom in the event of foreign invasion or civil war; but every question in respect to the action of the limitation has been set at rest since 1866, when, as already noticed, [§ 10] Her Majesty was pleased to extend it beyond the limits of the British Isles, by an alteration in the hundred and eighty-ninth article of war.

does not extend without the realm, by the terms of the mutiny act,

but has been so extended by her present Majesty.

40. Subject to this limitation of capital punishment as to the crimes expressly made liable thereto by the mutiny act, courts martial, wherever held, may legally take cognizance of offences without reference to the place of their commission, at home or abroad, on land or upon the sea. (9) But by the Queen's regulations for the army, "general, and other officers, commanding on foreign stations, are restricted from sending home officers or men, with articles of accusation pending against them, except in cases of the most urgent and unavoidable necessity, as it is essential for the due administration of justice, that when charges are preferred, they should be thoroughly investigated on the spot, and without unnecessary delay." (1)

Courts martial may try offences, wherever committed,

but they ought to be investigated where they occur.

41. The mutiny act renders offences against it, or the articles of war, committed in any part of Her Majesty's dominions, (2) or elsewhere, triable and punishable by courts martial in any part of Her Majesty's dominions, or elsewhere, "as if the offence had been committed where such trial shall take place." When first introduced into the mutiny act, the provision was to the effect, that an "officer or soldier committing an offence beyond sea, and coming within the realm, should be punished for the same *only as if committed within the realm*;" and it was then held to be contrary to law to send a prisoner for trial out of the realm. The proviso in the first clause of the existing mutiny act, and that in the articles of war, until altered in the year 1866, [§ 10, 39] were the same in effect: an officer or soldier, on foreign

If tried elsewhere, they are punished as if committed where the trial takes place.

(9) M.A.15.

(1) G.O. 1 Feb. 1804, Q.R.S.6.p.52.

(2) M.A.7.

service, may have committed an offence not specified in the mutiny act, for which, if tried abroad, he would, by the operation of the articles of war, have been liable to the punishment of death; whereas, if tried for the same at home, death could not be awarded—a distinction in unison with other distinctions of British law, and productive of no inconvenience or incongruity. (3)

The holding of general or other courts martial on board ships in commission is forbidden.

42. Courts martial, however, although the mutiny act and articles of war prescribe no limit to their jurisdiction as to place, are restricted as to the place of sitting. The hundred and thirteenth article of war implicitly excepts ships “in commission” so far as concerns detachment courts martial; and the Queen’s Regulations for the army have, since 1844, laid down in express terms that “no military court martial is ever to be held on board any of Her Majesty’s ships in commission.” (4)

The land forces subjected to naval discipline

43. Recent legislation has made a radical alteration in the statutory right of officers and soldiers to be tried under the powers of the mutiny act in respect to their conduct on board ships of war,—a change in the legal position of the

(3) What would be the effect of this clause of the mutiny act, when applied to a civil officer employed in the war department in the British Isles, or at a foreign station? Such persons, employed in the United Kingdom, are not subject to the provisions of the mutiny act; if, therefore, such civil officer in the British Isles, or at a foreign station, commit an offence for which he is liable to be tried by a court martial, and be brought home with the charge pending, he would doubtless, from the express words of the clause, be subject to trial by a court martial, but could only be punished as if his offence had been committed “where such trial shall take place.” Now, the same act, which, if committed by a civil officer out of the United Kingdom, would amount to an offence cognizable by a court martial, is, with reference to the jurisdiction of such courts, no offence, if committed by the civil officer within it; and hence arises a case, unimportant as it may be, not provided for by military law. A court martial appears therefore to be placed in the strange predicament of being authorized to

try, but incapacitated from awarding punishment.

(4) *See below*, § 48. An order by the Duke of York, of the 19th April, 1800, had made known to the army that “the holding of general or regimental courts martial on board His Majesty’s ships of war is contrary to the rules and discipline of the navy, and is on no account to be practised.” This order was occasioned by a representation from the Admiralty that Lieut. Col. Talbot, commanding 2nd Battalion, 5th Foot, had broke a sergeant by regimental court martial on board H.M.S. Niger, in Torbay, contrary to the opinion of her captain.

Regimental courts martial had, up to that time, been very generally held on board men of war by allowance of individual captains. There are examples of officers and soldiers being tried, and of the award of capital sentences by general courts martial, on board men of war, in the reign of Queen Anne, when the statutory laws of the navy, bearing on their legality, were the same as they continued to be until the year 1861.

army, the most signal since the passing of the first Mutiny Act in 1689, although it does not appear to have given rise to any discussion in either house of parliament. The "Naval Discipline Act, 1861" (23 & 24 Vict. c. 123), *sec.* 78, enacted—and the "Naval Discipline Act, 1866" (29 & 30 Vict. c. 109), repeats the provision—"Her Majesty's land forces, when embarked on board any of Her Majesty's ships, shall be subject to the provisions of this act, to such extent, and under such regulations, as Her Majesty, her heirs and successors, by any order or orders in council, shall at any time or times direct."

under regulations framed in pursuance of the naval discipline acts.

44. 45. Under these acts successive orders of the Queen in council have been made. That now in force received Her Majesty's approval at Windsor, the 12th December, 1873, and embodies amended regulations proposed by the Lords of the Admiralty with the concurrence of the Secretary of State for War and His Royal Highness the Field Marshal commanding in Chief.

The existing order in council contains no direction as to the land forces when serving as marines being placed on the same footing as marines when a part of the complement of the ship.

46. These regulations are here given in the form they were laid before the council board in the admiralty memorial: (5) "I. Whenever any of your Majesty's Land Forces, or any Royal Marines formed into a separate corps or battalion, shall be embarked as passengers in any of your Majesty's ships, the officers and soldiers shall, from the time of embarkation, strictly observe the laws and regulations established for the government and discipline of your Majesty's navy, and shall for these purposes be under the command of the senior officer of the ship as well as of the superior officer of the squadron, if any, to which such ship may belong."

Existing regulations for troops when embarked for passages on board ships in commission.

47. "II. If any officer or soldier shall commit any act against the good order and discipline of the ship in which he is embarked, the commanding officer of the ship may, by his own authority, and without reference to any other person, cause him to be put under arrest, or to be confined as a close prisoner; and shall thereupon, if he thinks the case requires it, transmit a report, in writing, of the charges against such officer or soldier to his superior officer, or, if there be no senior officer present, to the commander in chief of land forces, in order that the offender may be brought before a military court martial."

Offences against the discipline of the ship.

Provisions as
to military
discipline,

but courts
martial not to
be held on board.

Maintenance
of discipline
by commanding
officer of ship,

subject to the
concurrence
of the officer
commanding
the troops;

and by the
officer command-
ing the troops
in respect to
minor offences.

The contin-
gence of land
forces serving
as marines is not
provided for
expressly in
these regula-
tions.

48. "III. If any officer or soldier commits any act which, in the opinion of the commanding officer of troops, requires a trial by court martial, such commanding officer shall, with the concurrence of the captain of the ship, cause him to be disembarked on the first opportunity, or to be removed to a transport ship, and be there proceeded against according to military law. No military court martial shall be held on board any of your Majesty's ships in commission." (6)

49. "IV. If any private soldier shall commit any act against the good order and discipline of the ship, the commanding officer of the ship, if he thinks the case requires the infliction of any summary punishment for which by the regulations of your Majesty's navy a warrant is necessary, shall apply for the concurrence, in writing, of the commanding officer of the troops as to the nature and amount of such punishment, if any, to be inflicted; and upon obtaining such concurrence in writing shall, by warrant under his hand, sentence the offender to suffer such punishment accordingly. The sentence shall in all respects conform to the provisions contained in the Naval Discipline Act, 1866, relating to summary punishments awarded by commanding officers. If the commanding officer of the troops shall decline to give his concurrence as aforesaid, he shall state his reasons in writing, and deliver the same to the commanding officer of the ship."

50. "V. The commanding officer of the troops, upon receiving a notification in writing to that effect from the commanding officer of the ship, may, in respect of minor offences committed by any of the troops embarked, award such summary punishments as are permitted by the Regulations of your Majesty's navy to be awarded without a warrant."

51. It will be observed that neither these regulations, nor the hundred and ninety-first article of war, *expressly* provide for the case of land forces embarked to do duty. Should the exigence of Her Majesty's service at any time again require it, it is to be hoped that any inconvenience would

(6) It was decided, on official authority, with reference to a case which arose during a temporary landing from H.M.S. Apollo, at Rio, in 1848, that in those circumstances the officer commanding the troops may assemble, and confirm the proceedings of a detachment court martial, independently of the officer commanding the ship.

be obviated by the good feeling and mutual endeavour of officers of the navy and army to promote the good of the service, and the honour of their common country and their sovereign, and by their determination to work heartily together on all points of duty. (7)

52. It is enacted by the ninety-seventh section of the mutiny act, that offences against former mutiny acts, East India Company mutiny acts, and any articles of war, may be tried and punished as if they had been committed against the existing mutiny act. But "no *person*" is liable to be tried or punished for any such offence, which shall appear to have been committed more than three years before the date of the warrant for such trial "unless the person accused, from having absented himself or other manifest impediment, has not been amenable to justice within that period," when it is extended to any time not exceeding two years after the impediment has ceased. (8)

Limitation as to time, for trial, under existing act, of offences against former mutiny acts.

53. Subject to this limitation of time, and by virtue of Her Majesty's power (9) of bringing offenders against the

Offenders against military law,

(7) The law having been altered, [§43] and in a sense so entirely different from the construction which had been placed upon the previously existing statutes by the military authorities, it would serve no purpose to reproduce the arguments by which the author supported his opinion, that offences against discipline, committed on board ships of war, by officers and soldiers of the land forces, could be tried only under the mutiny act and articles of war by a military court martial.

The reader, for whom the question may still possess an interest, is referred to the fourth edition of this work (pp. 100-117); nor will he be displeased to be directed to an opinion by the law officers of the crown, upon a case referred to them by the Duke of York, arising out of the dismissal by a naval court martial of Lieutenant Gerald Fitzgerald, of the 11th Foot, which was quoted in Sir John Barrow's *Life of Admiral Lord Howe* (pp. 307-308), subsequently to the appearance of the author's observations, and is entirely to the same purport.

Lieutenant Fitzgerald was embarked with a part of his regiment serving

as marines, and was tried before a naval court martial, held on board H.M.S. *Princess Royal*, in San Fiorenzo Bay, Corsica, on the 3rd July, 1795, "for having behaved with contempt" to the captain of the ship on board of which he was serving, and, respectfully declining to enter upon any defence, was sentenced to be dismissed His Majesty's service. He was reinstated at the instance of the Duke of York, who denied the right of a naval court martial to try an officer of the army.—See Barrow's *Life of Lord Howe* (1838), 304-308; McArthur on *Courts Martial* (1813), i. 202, 406-411.

(8) In the case of officers and men of the reserve force this period is further limited to "twelve months after the offence has been committed, or the offender has been apprehended."—"Reserve Force Act, 1867," (30 & 31 Vict. c. 110,) s. 12. There is also a corresponding provision in the "Militia Reserve Act, 1867," section 11.

(9) M.A.7, where, not "*persons subject to this act*," as in section 15, of persons who may commit crimes, but "*offenders against this act and the articles of war*."

whether in or
out of the
service,

mutiny act and articles of war to justice, the jurisdiction of courts martial extends to every case where charges are exhibited against persons to whom the provisions of the mutiny act were applicable at the date of the offence; and this, it will be observed, whether they have continued in the service, or have subsequently ceased to belong to it.

continue amen-
able to justice,
as in the case of
Lord George
Sackville, who

54. This liability was clearly established by the celebrated trial of Lord George Sackville for his conduct at the battle of Minden. It appears, from the case referred to the attorney and solicitor general, that on his return from Germany, Lord George, in a letter dated the 7th September, 1759, "humbly requested His Majesty to give him an opportunity of justifying himself before a court martial to be appointed for the purpose of giving judgment on his conduct." But the King (George II.), "on the 10th of September, was pleased to dismiss Lord George Sackville from his service as Lieutenant General and Colonel of Dragoon Guards." "His Lordship having no other place or office in the army besides those above-mentioned, and being totally removed from all military employment, repeated his request for a court martial, to which His Majesty was pleased to consent if it might be according to law." "Upon the question, 'Whether an officer is triable by a court martial for a military offence, after having been dismissed from all His Majesty's employments,' the above-mentioned law officers(1) to whom the case was referred stated that they were 'of opinion that an officer guilty of offence against martial law, while he is in actual service and pay, may be tried by court martial after having been dismissed from all his military employments.'"

for offences
against martial
law, or in more
modern phrase
against mili-
tary law,

was brought
to trial, and,

55. Upon this Lord George Sackville was brought to trial before a general court martial held at the Horse Guards on the 27th February, 1760, under a special warrant dated the 26th January, but, the president having been taken ill, a new warrant was issued on the 6th March, and on the following day the court assembled and proceeded with the trial. In the interval, however, by the King's command, signified by a letter from the lord keeper, the following question was referred to the judges, "whether an officer of

the opinion of
the twelve
judges having
been obtained,

(1) Signed "C. PRATT, C. YORKE, 1760."—State Paper Office. Domestic. Lincoln's Inn Fields, 12th January, Geo. II. No. 185.

the army having been dismissed from His Majesty's service, and having no military employment, is triable by a court martial for a military offence lately committed by him while in actual service and pay," upon which they informed His Majesty in reply, that they "have taken the same into consideration, and see no ground to doubt of the legality of the jurisdiction of a court martial in the case put by the above question." (2)

56. Lord George Sackville was eventually found guilty of disobedience of orders, and adjudged by the court to be "unfit to serve His Majesty in any military capacity whatever." George II. hereupon issued a very severe order making known this sentence (3) to the army, and with his own hand erased his name from the roll of privy councillors.

was sentenced
by the court
martial.

57. The trial of Lord George Sackville exemplifies the law as to persons who have ceased to belong to the service, and the following precedent is equally important as bearing on the case of officers placed on half-pay subsequent to the date of the transaction investigated by the court martial. Lieutenant James Blake, when on half-pay, was tried by a general court martial assembled on the 30th May, 1805, for offences committed when on full pay, (4) and was sentenced to be cashiered, which sentence was approved by the King and carried into effect: he was described in the charge as *on half-pay* of the York Rangers, and late of the 2nd battalion 44th regiment of foot. It may be right to observe, that "previous to arraignment, the prisoner informed the court, that it never having been notified to him as having been put on the half-pay of the York Rangers, he still conceived himself a lieutenant in the 2nd battalion 44th regiment, and acknowledged himself subject to martial law." (5) It is obvious that the concurrence or acquiescence of the prisoner could affect neither the law of the question, nor the jurisdiction of the court; if not answerable before it according to law, no man, by any effort, could bring himself within its jurisdiction.

Case of officers
tried when on
half-pay.

The competence
of the court in-
dependent of
any act of a
prisoner
before it.

(2) Extract — Letter dated 3rd March, 1760, signed by the then judges.

(3) It was intimated to Lord George, before the trial was ordered, that if the sentence were death, it should be carried into execution, and this, after the recent example of Admiral Byng, he

had little reason to doubt.

(4) The offences of which Lieut. Blake was found guilty were committed on the 11th May, and his exchange to half-pay was dated 16th May.

(5) Manuscript copy of the proceedings of the trial.

Jurisdiction
as to persons :

commissioned
or in pay as
officers, and
listed or in pay
as soldiers.

Ordnance corps.

Company's
troops.

Foreign corps.

58. The persons who in the time of peace are amenable to military law, and in a position to commit offences cognizable by courts martial, are those only who are subject to the mutiny act. Formerly the first section of the mutiny act provided for the case of officers and soldiers in general terms, and by a declaratory enactment further particularized officers and persons serving in the Royal Artillery (6) and Engineers, and certain other persons as within its intent and meaning. In 1863 the act was extended to officers and soldiers of the Indian forces, who from the year 1754 had been subject, when serving out of the United Kingdom, to the Indian mutiny acts and articles of war. (7) The mutiny act has, since 1847, specified the persons subject to the act in the second section. [§ 59] The fourth section enacts that colonial and foreign troops (8) raised under Her Majesty's commission shall be subject to the mutiny act and articles of war

(6) See § 29. A court martial was assembled on the 9th October, 1761, for the trial of four gentlemen cadets for misbehaviour in the Academy, and on the 2nd November one cadet was "dismissed the regiment" by the sentence of the court.—Wilmot's *Records of the Royal Military Academy* (1861), p. 11. No court martial has been held upon a cadet since 1792. Lieut. General Sir Lintorn Simmons, the present Governor of the Academy, informs the editor, that after the Ordnance corps ceased to be under the command of the Master General, the cadets were no longer mustered in the Royal Regiment of Artillery.

(7) An Act (26 & 27 Vict. c. 48) was passed on the 18th July, 1863, repealing the East India Company Mutiny Act. Officers, soldiers, and followers of the Indian army, being natives of India, under a proviso in the first section of the mutiny act, continue subject to the articles and regulations in force under the authority of the Government of India. The "Indian Articles" now in force for the government of the native army, ("the Indian Councils Act, 1861," sec. 22) were enacted by the Governor General of India in Council, Act No. v. of 1869.

(8) A.W.109. The terms of the mutiny act and article of war are not precisely identical, the words of the act being "raised and serving," and those of the article "raised or serving;" but it is evident that the liability "to be tried by courts martial in like

manner as our forces are" [A.W.109], applies only to colonial levies or corps composed of foreigners, raised for Her Majesty's service, as, for example, the German Legion, which did such good service in the Peninsular war. This liability could not be extended to the troops of a foreign state when taken into British pay. The Dutch regiments which landed with the Prince of Orange at the Revolution in 1688 were the first example. Other foreign troops quickly followed, and were employed in the reduction of Ireland, and as a measure of precaution against those who were still loyal to the fallen dynasty in England. A corps of Danes was landed at Hull, and quartered in the East Riding of Yorkshire, and the following doggrel epitaph on a tombstone in the churchyard of St. Mary's, Beverley, preserves the memory of their exemption from English law, either civil or military:—

Here two young Danish soldiers lye,
The one in quarrell chanc'd to die;
The other's Head, by their own Law,
With Sword was sever'd at one Blow.
December the 23rd, 1669.

Their burial is entered in the parish register "1689, Dec. 16, Daniel Straker, a Danish trooper, buried." "1689, Dec. 23, Johannes Frederick Bellow, beheaded for killing the other, buried."

The Hanoverian and Hessian regiments in the reign of George II. and the earlier years of George III. were for the most part intended for service

as her other forces are. The fifth section provides that the act shall not "extend to any militia forces or yeomanry or volunteer corps in Great Britain or Ireland, or to the reserve force provided for by 'The Reserve Force Act, 1867,' or to the reserve force provided for by 'The Militia Reserve Act, 1867,' excepting, as stated in the second section of this act, and *as hereinafter enacted*, (9) or where by any act for regulating any of the said forces or corps," the provisions of the mutiny act are specifically made applicable. (1)

Auxiliary forces.

Reserve forces.

59. The second section of the mutiny act, as before observed [§ 58], specifies the persons who are subject to the act, and is followed in this specification by the hundred and eighty-seventh article, in which the Queen declares the application of the articles of war. It has been frequently altered in successive years, and the act of 1875 now enacts :

Statutory specification of persons amenable to courts martial.

"All the provisions of this act shall apply to all persons who are or shall be commissioned [§ 60] or (2) in pay as an officer, or who are or shall be listed or (2) in pay as a non-commissioned officer or soldier, and to all warrant officers, and to all persons employed on the recruiting service receiving pay, and all pensioners receiving allowances in respect of such service, and to persons who are or shall be hired to be employed in the royal artillery, royal engineers, and to master gunners, and to conductors of stores, and to the corps of royal military surveyors and drafts-men, and to all officers and persons who are or shall be serving in the control department, and to officers and soldiers serving in the army service corps, and to persons in the war department, who are or shall be serving with any part of Her Majesty's army at home or abroad, (3) under the command of any commissioned officer, and (subject to and in accordance with the provisions of an act passed in the thirtieth and thirty-first years of the reign of Her present Majesty, chapter one hundred and ten) to any out-pensioners of the Royal Hospital, Chelsea, who may be called

Officers and soldiers in general terms,

and then recruiters.

Ordnance,

Control,
Army service corps,

enrolled pensioners,

abroad, and they tried and punished offenders among themselves.

(9) The words in italic were added in the mutiny act of 1872, and refer to the new provisions (M.A.105-6) as to attaching militia, yeomanry, and volunteers to the regular service.

(1) "The militia, volunteer, and yeomanry forces will henceforth be termed 'Auxiliary Forces.' The army reserve, including the enrolled pensioners, will retain the designation of 'Reserve Forces.'" — W.O. Circular, 30th April, 1872.

(2) "Or" was substituted for

"and" in 1708—7 Anne, c. 4, s. 1.—to meet the case of gentlemen volunteers and men irregularly enlisted.

(3) It will be remarked that persons in the war department serving under the command of a commissioned officer, under which head are included artificers of different descriptions, as collar makers, wheelers, smiths, &c., frequently attached to the artillery and engineers, are subject to the mutiny act whether serving at home or abroad; whereas civil officers [§ 41a] of the war department are not so subject unless employed out of the United Kingdom.

civil officers under war department,	out on duty in aid of the civil power, or for muster or inspection, or who, having volunteered their services for that purpose, shall be kept on duty in any fort, town, or garrison, and to all civil officers who are or shall be employed by or act under the secretary of state for war at any of Her Majesty's establishments in the islands of Jersey, Guernsey, Alderney, Sark, and Man, and the islands thereto belonging, or at foreign stations; and all the provisions of this act shall apply to all persons belonging to Her Majesty's Indian forces, (4) who are or shall be commissioned or in pay as officers, or who shall be listed or in pay as non-commissioned officers or soldiers, or who are or shall be serving or hired to be employed in the artillery or any of the trains of artillery, or as master gunners or gunners, or as conductors of stores, or who are or shall be serving in the department of engineers, or in the corps of sappers and miners, or pioneers, or as military surveyors or draftsmen, or in the ordnance or public works or commissariat departments, and to all storekeepers and other civil officers employed under the ordnance, and to all veterinary surgeons, medical storekeepers, apothecaries, hospital stewards, and others serving in the medical department of the said forces, and to all licensed sutlers, and all followers (5) in or of any of the said forces. (6) And this act shall apply to all persons receiving pay as members of the permanent staff of any militia regiment, and to all persons being enrolled in the militia who are attached for purposes of instruction, or otherwise, to a regiment or body of troops of the regular forces, and to all militia recruits [§23] and other persons receiving pay in the militia during the period of preliminary training, when the militia battalions to which they belong are not for the time being out for training and exercise, and to all men enrolled in the reserve force when called out for training or exercise, or when kept on duty having volunteered their services, or when called out in aid of the civil power, or when called out on permanent service under Her Majesty's proclamation."
Indian forces	
including civil officers,	
medical department,	
and European followers.	
Officers, &c., permanent staff.	
Militia attached to regulars.	
Militia recruits during recruit or preliminary training.	
Men of the Reserve Force.	

(4) The specification of the Indian forces was inserted in 1863 from the second section of the last Indian Mutiny Act (12 & 13 Vict. c. 43), the words "Her Majesty's Indian forces" being substituted for the words "any of the forces of the East India Company."

(5) The sutlers and followers intended by these words are other than natives of India [§ 58n], who are subject to the native articles and regulations.

(6) The words "The said forces" were most probably intended to apply only to the Indian forces. Followers

of the army in India had been for many years amenable to military discipline under express statutory provisions; and no other forces are mentioned, *eo nomine*, in the section. The view here suggested is confirmed by the fact that the "Military Manœuvres Act, 1873," as in previous years, expressly renders (sec. 12) holders of licences as sutlers or followers of the forces subject to the mutiny act and articles of war, and this would have been unnecessary, if the specification of licensed sutlers and followers in this section had been applicable with- in the United Kingdom.—See § 71.

60. Officers on half-pay were expressly mentioned in a declaratory clause in the Mutiny Act of 1748, but afterwards this specification (7) was omitted, and until the substitution of "commissioned" for "mustered" in the general description in the Mutiny Act of 1786, neither brevet officers nor officers on half-pay were within the terms of the act. (8) The description, as then amended, and as it now stands, unquestionably includes all officers holding brevet commissions. Mr. Tytler, in the first edition of his Essay, laid it down that it also included half-pay officers: this he altered in his revised edition, (9) and meanwhile prefixed a "material correction" to the former, in which he states that he had been certified "that in framing the clause of the mutiny act as it now stands, by which all officers, commissioned or in pay, are declared liable to its authority, it was not the intention of the legislature to include *officers on half-pay* in that description; but that officers holding brevet commissions, without pay, were understood to be included."

Signification of "commissioned";

it includes all brevet officers, but it is

a question whether half-pay officers are included.

61. However this may be, it is certain that under the law as it then stood, officers on half-pay, though not holding brevet rank, or employed on the staff, have been held liable to military arrest, otherwise than with respect to their conduct on full pay, and consequently amenable, it might be inferred, to military law. This appears by the orders [G.O. 452] which promulgated the court martial on Lieutenant John Mahon, of the 9th foot, who was found guilty of striking Lieutenant Geagan, *half-pay* 8th West India regiment, (10) in the mess-room of the detachment 9th foot,

Half-pay officers amenable to arrest; but

(7) 21 Geo. 2, c. 6. and 22 Geo. 2, c. 5. Some half-pay officers had been tried at Preston in 1715 for joining in "the affair" of that year, and four were shot by the sentence of the court martial. (Tindal, *History of England*, xxi. 387.) But the amenability of half-pay officers to trial was, nevertheless, a question, until this clause was inserted, declaring that they should "in all respects whatsoever be holden to be within the intent and meaning of every part of the Act."

(8) Tuesday, 27th April, 1785, "the court martial appointed to try General Ross met agreeable to their adjournment to receive the opinion of the twelve judges of England on the point submitted to them, viz. whether General Ross, as an officer on half-pay, was

subject to the tribunal of a court martial? The judges gave an unanimous opinion, that *he was not, as an half-pay officer, subject to military law*. They stated their answer in two points, and in both declared it as their opinion, that neither his warrant as a general officer, nor his annuity of half-pay, rendered him obnoxious to military trial. In consequence of this the general was discharged from the custody of the marshal, and the court broke up."—*Annual Register*, xxvii. 230.

(9) Tytler (1806), 112.

(10) Lieut. Geagan had been on half-pay for some years at the date of this transaction, having been placed on half-pay on the 25th December, 1815.

in the barracks at Morne Bruce, Dominica, on the night of the 3rd July, 1819, and sentenced to be discharged from His Majesty's service. On the recommendation of the court he experienced the royal clemency. The Prince Regent was at the same time pleased to command that Lieutenant Geagan should be severely reprimanded for the whole of his conduct in the different stages of this transaction, and "that his deep displeasure should be expressed at the conduct of Captain Ogle, who was president of the mess at Morne Bruce when this affair happened, as having been grossly negligent of his duty, in not interposing his authority on that occasion, by putting the *parties under immediate arrest*; thereby effectually preventing . . . the fatal consequences which might have ensued to Lieutenant Mahon and Lieutenant Geagan from their being left at large."

whatever
interpretation
commissioned
may bear,

62. The substitution of "commissioned" for "mustered" in 1786 [§59] gave rise to much discussion in both houses of parliament; and the debates may tend to show the intention with which the alteration was introduced, but they cannot decide the point of law. It does not appear that any opinion of high legal authority has subsequently been given on the question. Whatever may be the true construction of the *mutiny act*, it would seem—so long as the incidental mention (1) of officers on half-pay stands a part of the articles of war, as at present worded—that the *articles* at all events must be taken to express the intention of the sovereign to confine the penalties of military law to offences committed during actual military service.

by the articles
of war half-pay
officers are not
amenable to
military law.

63. Some members who took part in the debate, expressed an opinion, that hardship and injustice to officers on half-pay would arise by subjecting them to military law; but when it is considered that an officer on half-pay may be summarily removed from the army list on the order of the sovereign, it will be admitted that their amenability to trial must be held as an advantage, and their actual trial a boon, rather than a hardship. The Lord Chancellor Thurlow aptly

Expediency of
subjecting
officers on half-
pay to military
law.

(1) A.W.109. The article was first introduced in 1829, and specifies the officers who may compose a district court martial. The proviso referred to has been continued without alteration—"provided such officers," i.e. of

the general staff, "are in the receipt of full pay on the staff, and are themselves *amenable to military law*, *ALTERNATELY* on the half-pay of their regimental rank."

remarked during the course of this debate, "If gentlemen chose to have the advantage of military rank, they ought to hold it on the condition of being subject to military law; and if they disliked that condition, they might ease themselves of the grievance by resigning their commissions." The respectability of the army would certainly be promoted by the trial and consequent dismissal of every officer who conducted himself in a manner derogatory to his profession; and, as on an officer's recall to military duty, whether by a new commission or by a staff appointment, (2) the commission which he retains on half-pay is that alone by which his rank in the army is ascertained, there can be no injustice, but a positive necessity, one would imagine, for rendering an officer accountable to the service for his conduct on half-pay. The exertion of the royal prerogative to dispense with the further service of an officer on half-pay is seldom resorted to but in very aggravated cases; nor can it be wished that recourse should be had to it more frequently, since its application must always be attended by difficulty—the delinquency of the officer being judged upon reports, and not by judicial enquiry.

64. It has also been held that an officer, when a prisoner of war on parole, is not amenable to trial by court martial. The question was raised in 1778 in the case of Lieutenant General John Burgoyne, who had returned to England after the convention of Saratoga. "A court of enquiry was appointed, but the general officers reported that, in his then situation, as a prisoner on parole under the convention, they could not take cognizance of his conduct. This spirited officer then demanded a court martial, which on the same grounds was refused." (3) General Burgoyne, who was member for Preston, then endeavoured to obtain a public enquiry in his place in parliament, (4) and ended by resigning his commissions. (5)

The parole of a prisoner of war held to be a bar to his arraignment before a court martial,

when, as in the case of General Burgoyne, he was most anxious for enquiry.

(2) See G.O. 89, 1st Dec. 1874; R.W. (1st March, 1873) 35.

(3) Annual Register 1778, p. 196*.

(4) The Solicitor General, afterwards Lord Loughborough, raised the question (28th May, 1778) whether as a prisoner of war he could vote in parliament, referring to the case of Regulus, as not being *sui juris*. Burgoyne pointed to Lord F. Cavendish,

who had sat and voted when on his parole in England after St. Cas, and the Speaker had no doubt as to his right, and the house was unanimous in the same opinion.—Hansard, *History*, xix. 1216.

(5) "Letter from Lieutenant General Burgoyne to his constituents on his late resignation," 1779.

"Listed, or in pay," comprehends masters of bands, &c. though not listed,

the being in pay as a soldier fixing the military character upon them,

as decided in the case of Serjt. Grant,

65. The words "listed or in pay as a non-commissioned officer or soldier," clearly comprehend masters of bands, schoolmasters, (6) serjeant-armourers, drummers, boys, and others, who, though not enlisted or attested, may be in the receipt of pay as non-commissioned officers and soldiers, as was not uncommonly the case under obsolete regulations. Were this otherwise doubtful, it would be evident from the decision in the often-quoted case of Serjeant Grant, who, though *not enlisted*, but being in pay as a serjeant in the 74th regiment, and employed on the recruiting service, was brought to a general court martial at Chatham on the 21st March, 1792, found guilty of having promoted, and having been instrumental towards, the enlisting of two men in the service of the East India Company, knowing them to be deserters from the Guards, and sentenced to be reduced to the ranks and to receive a corporal punishment. He thereupon applied to the court of common pleas for a writ to prohibit the execution of the sentence. In remarking on the refusal of a prohibition in this case, it should be noticed that there was not at that time any clause parallel to that in the second section of the present mutiny act, which expressly includes "persons employed in the recruiting service, receiving pay in respect of such service." It is also to be collected from the judgment of the court given by the chief justice (Lord Loughborough), (7) that a person once in the receipt of pay as a soldier, though not enlisted, must serve till discharged, or till the completion of his engagement. (8)

66. A modification of the general terms "listed or in pay" has been introduced into the mutiny act, the forty-seventh

(6) It is no longer the custom to dispense with a regular attestation in any case. Schoolmasters are now attested for general service.—R.W.840. The Queen's Regulations lay down that "When a schoolmaster is placed in arrest, the facts and circumstances of the case are to be reported to the adjutant general. If abroad, the general officer commanding on the spot is to give such orders on the subject as he may think fit, reporting the particulars of the whole case to the adjutant general; but no punishment awarded by a court martial is to be carried into effect until the proceedings have been submitted to the com-

mander in chief, except at St. Helena, the Cape of Good Hope, and stations eastward of it."—Q.R.S.9.p.33.

(7) "A person in pay as a soldier is fixed with the character of a soldier, and if once he becomes subject to the military character, he never can be released but by a regular discharge."—Grant v. Sir Charles Gould, 2 H. Blackstone's Reports, 104.

(8) Soldiers can claim their discharge as a matter of right on the expiration of their engagement (Q.R. S.20.p.1,4), but, until their discharge is carried out (A.W.21) and so long as they are *in pay*, are subject to the act. See § 254n.

section providing: "No recruit, unless he shall have been *attested*, or shall have received pay *other than enlisting money*, shall be liable to be tried by court martial." Recruits absconding in these circumstances, are punishable as "rogues and vagabonds" by two justices of the peace.

but does not include unattested recruits, who have not received any daily pay.

67. Mr. Tytler in some measure countenanced the opinion that peers, who are officers, are exempt from trial by courts martial, and extended the principle to members of the house of commons, by assuming that, "as the law has not expressly warranted the suspension of parliamentary privileges in such cases, the safest course seems to be, that previously to the arrest of any member, in order to trial for a military crime, notice should be given to the house of which he is a member, with a request that, for the sake of public justice, they should consent to renounce the privilege in that instance, in so far as the body of parliament is concerned, as the individual member is understood to have renounced it for himself, by the acceptance of a military commission." (9)

Members of parliament, commissioned or in pay, liable to arrest and trial.

68. The privilege of parliament, however, so far as it concerns the peers, had been the subject of legislation in many of the earlier mutiny acts. The 1 Anne, c. 16, s. 42 runs thus, (10) "Provided also, that if any peer of this realm shall commit any of the offences aforesaid, in any parts beyond the seas, and shall not have been there tried for the same by martial law, and after his return into this realm shall be indicted of any offence hereby declared or enacted to be treason or felony; that then, and after such indictment, he shall have his trial by his peers, in such like manner and form as hath been accustomed." It may be observed that peers were subject to trials by courts martial for any offence beyond the seas, as other officers and soldiers; and secondly, that within the realm, their privilege only availed in those cases where, for the offences declared to be treason or felony, other officers and soldiers were liable to be indicted and tried in the ordinary course of law. The terms of the mutiny act—"Any person commissioned or in pay as an officer,"—must necessarily include all peers and members of parliament, who may be commissioned or in pay; and, since no exception to the general enactment now

Peers in England formerly tried by their peers for certain military offences committed abroad.

(9) Tytler, 125.

20, s. 42; 3 & 4 Anne, c. 16, s. 43;

(10) Similar are the 2 & 3 Anne, c. &c., and 10 Anne, c. 13, s. 56.

but now subject
to military law
as other officers.

exists (the clause referred to, relating to peers, having for a series of years been omitted), it follows, that the peers and members of the lower house, in passing the statute in these general terms, have waived their privilege (1) so far as it might have been implicated by the arrest or trial of individual members. This also appears from the proceedings of the House of Lords, in March 1749, when an ineffectual attempt was made to insert a clause in the mutiny act, exempting peers from trial by courts martial.

Officers are not
amenable to
military law
after the con-
firmation of the
sentence of penal
servitude,
but soldiers
continue to be so
till discharged.
Offenders may
be brought to
trial when
imprisoned
under ordinary
process, or
sentence of
courts martial ;

69. Every officer sentenced to be kept in penal servitude ceases to belong to Her Majesty's service upon the confirmation of the sentence. (2) Soldiers sentenced to penal servitude may be discharged forthwith by order of the commander in chief. (3)

in common
jails ; or

70. Offenders in prison, whether under sentence of court martial, or otherwise, are amenable to justice. When it may be necessary to bring to trial persons who may be detained on a civil or criminal process, the 43 Geo. 3, c. 140, empowers any of the judges of the courts of Westminster to award a writ of *habeas corpus* for bringing up any prisoner for trial before courts martial in like manner as they award such writs to bring up persons, detained in jail, before magistrates or courts of record. In the case of a prisoner under the sentence of a court martial in any public prison other than military prisons, an order may be given by the military authorities in writing, for such prisoner to be delivered over to military custody for the purpose of being brought before a court martial for trial. When confined in a military prison, the secretary of state for war, or the general or other officer commanding the district, where such prison may be, are in like manner authorized to give directions for this purpose. (4)

in military
prisons.

The mutiny act
does not extend

71. To the description of persons, in the military service,

(1) In point of fact the privilege from arrest does not extend to criminal cases ; but, as may be learnt from the standard authority — May, *Law of Parliament* (1851), p. 131 — " it has been used to communicate the cause of commitment *after the arrest*, as in the case of Lord George Gordon for high treason in 1784, and Mr. Smith O'Brien, in 1848 ; " and in the journals,

both lords' and commons', may be found instances where a similar course has been observed with respect to members who have been *under arrest* in order to trial by military and naval courts martial.

(2) A.W. 20.

(3) A.W. 23.

(4) M.A. 31

who are subject to the mutiny act and to trial by courts martial by the express provision of the mutiny act or other statute, may be added persons coming under the denomination of followers (5) of the army in the field; who, though neither enlisted nor in pay, have at all times been subject to orders according to the rules and discipline of war, and whether temporarily or permanently attached to, or momentarily and accidentally connected with, the army in the field, or on the line of march, are liable, by order of the commander of the forces, to trial by courts martial. The campaigns in the Peninsula afford examples of the trial, conviction, and punishment, in some cases capitally, of civilians, both men and women, British subjects, foreigners and natives of the country. In India followers, European and native, and of both sexes, (6) were included in the specification of persons subject to the East India Company mutiny act; and this clause was added to the annual mutiny act in 1863 [§ 59] in anticipation of the repeal of the Company's act.

its provisions to followers of the camp, in express terms,

except in India,

72. With reference to this extended jurisdiction of courts martial, it is particularly to be observed, that though courts martial, sitting in default of a competent civil judicature, are bound, by the express terms of the article under which they are held, to recognize such crimes only as are punishable by a court of ordinary criminal jurisdiction in England, and to apply to them such punishments alone, as by such laws are sanctioned; yet this limitation does not apply to the trial of followers of the army, which would now be held by order of a commander of an army in the field, by virtue of the discretionary power vested in him by the hundred and sixty-fourth article of war, and which were formerly held under the third article of the twenty-fourth section; the persons described in which were expressly "subject to orders according to the rules and discipline of war," and were thereby necessarily liable to military punishment for any breach of

the same law being applied as to soldiers.

(5) § 59a.

(6) At a general court martial at Meerut, on the 6th August, 1825, Hannah Fitchet, wife or reputed wife of Private Joseph Fitchet, 14th Foot, was tried for murder on the 2nd August, found guilty of manslaughter, and sentenced to two years' imprison-

ment. The sentence was confirmed, but General Sir Edward Paget, the commander in chief in India, considering that the manslaughter very nearly approached an act of justifiable homicide, mitigated the sentence to three months' imprisonment.—G.O. Calcutta, 15th Sept. 1825.

good order, whether as affecting the discipline of the army, or the private rights of individuals.

Courts martial are called on to apply the criminal law of England.

73. A very confused apprehension has been entertained respecting the operation of the third and fourth articles of the twenty-fourth section of the old articles of war, until they were recast in 1829; they have been by some most unaccountably blended together, when, in effect, they are directly the reverse of each other. (7) These articles are literally obsolete, but as to their effect they are preserved in the hundred and sixty-fourth and the hundred and forty-third articles. The third article applied to retainers of a camp, and to all persons whatsoever serving in the field, where it would often be impracticable to carry into effect the minor punishments prescribed by English law, and rendered persons, not otherwise amenable to military law, subject for the time to its control. The fourth article, referring only to persons forming an integral part of the army, referred to time of peace or inactivity; it was in this respect similar in effect to the present hundred and forty-third article, which provides for the trial by courts martial of such persons, when accused of civil offences in places beyond the seas, where there may be no competent civil judicature.

Where courts of British civil judicature, are not in force, courts martial supply their place for the trial of soldiers,

still recognizing the supremacy of the known laws of the land.

74. The sovereign, by the exercise of the royal prerogative (as exerted in the article extending the jurisdiction of courts martial), as well of the chief civil magistrate as of the superior of the military state, by substituting a military for a civil court, makes no alteration as to English law, but simply in the channel of dispensing it—neither suspends, supersedes, nor displaces it, but provides for the trial of offences; and, until the modification of this article, which will be presently adverted to [§76-9], preserved to the military, when serving in foreign parts, where our laws do not extend *proprio vigore*, the inestimable privilege of trial by

(7) Mr. Samuel, in his commentary on the Articles of War, has failed to make a very obvious distinction, when referring to the case of Jose Bernados and Jose Antenosia (page 700). The court for the trial of these persons, not being held by virtue of the 4th art. 24th sec., was not limited to punishments known to the common and statute law of England; but, by the

3rd art. (under which it was held), was bound to proceed according to the rules and discipline of war, which have immemorially sanctioned either capital or corporal punishment as applicable to plundering, or offences against members of the army, or inhabitants of the country in which the army may be actively employed.

the laws of their country. A court martial, assembled under this article, ceases to be influenced by the authorities which ordinarily guide it; the mutiny act, the articles of war, the general regulations for the army are no longer the text books by which to ascertain offence; they are only to be resorted to as affecting the constitution of the court, and the manner in which its proceedings are conducted; the article in question extending its competence to all crimes punishable by ordinary courts in England, and confining its award to sentences in conformity to English law. (8) Its jurisdiction is essentially civil, the offences brought within its cognizance having no connection with military discipline, the punishment awarded by it being exclusively those known to the common and statute law, and the soldier himself, thus especially rendered amenable to it, appearing before the court rather as a citizen than a soldier. In England, the delinquencies of soldiers are not necessarily tried, as in most countries of Europe, by military law. Where they are ordinary offences against the civil peace, they are triable by the common law courts, the mutiny act having wisely declared the supremacy of the ordinary course of law within the realm, and requiring commanding officers to deliver over to the civil magistrate, on application being made for that purpose, officers or soldiers accused of such offences, under a summary and severe penalty for any wilful infraction of the law. (9)

Supremacy of
the courts of
civil judicature.

75. The alteration in the article, now the hundred and forty-third, is very important, and essentially affects the rights of every British soldier. Before the year 1832, it was provided that "any officer or soldier accused of any capital or other crime punishable by the known laws of the land, but who may

Soldiers once
subject to British
law only,

(8) Gunner John Suddis, R.A., having been sentenced to be transported by a general court martial, held at Gibraltar on the 19th May, 1800, the question was argued before the Court of King's Bench, on a writ of *habeas corpus* on Feb. 9, 1801, whether under the then article, which authorized punishment "according to the nature and degree of the offence," the sentence was necessarily regulated by the law of England. Two of the judges adverted to this point, and decidedly gave their opinion that such

adherence was not necessary; but, subsequently, the King's declaration of the meaning of the article, communicated in a circular letter, dated 12th Dec. 1807, from the Duke of York to general officers commanding on foreign stations [§1053] until 1830 effected collaterally that which has been done since then by the article itself in express terms, and restricted the punishment of crime to the limits of the common and statute law.

(9) M.A.76.

be serving in Gibraltar, or in any place beyond seas where there is no form of *our civil judicature in force*, should be tried by a general court martial, and if found guilty, should suffer death, or such other punishment as by the sentence of such general court martial may be awarded; such sentence, nevertheless, to be in conformity to the common and statute law of England." (1)

76. That "our civil judicature" intended only civil judicature similar, or analogous, to those of the kingdoms of England, Scotland, and Ireland, there can be no doubt, and this was the sense in which the article had been received and applied. It effectually secured a British soldier, when called beyond seas in the execution of his duty, from trial by any judicature that was not assimilated to a British court of justice. It has, however, been deemed expedient to limit the operation of this equitable provision to places where there may be no civil judicature in force by the appointment or under the authority of Her Majesty ("by our appointment or under our authority"); a soldier, therefore, accused of civil crime, serving *in any place* beyond the seas, where there is no form of British civil judicature, can no longer claim to be tried by a court martial and according to the law of England, if there be any court of civil judicature in force, under the authority of Her Majesty, which may not declare itself incompetent [§166] to try him. (2) Such

now subject to
any judicature
under the
authority of
Her Majesty.

(1) Articles of 1831, Art. 102.

(2) In the first edition, the lamented author of this work, had given his opinion, at some length, of the importance and value of the then article of war, which secured a British soldier, accused of crime, from trial by any laws but British. Although his remarks are not directly applicable to the question as it now stands, yet reproducing a part of them may be excused, if they tend to preserve the recollection of rights of which the British soldier of a former generation was not in any case deprived. He observed that "Though the supremacy of the English law is undoubted, and though every soldier has a common interest with his fellow citizen to maintain its superiority and integrity, yet it would be lamentable indeed, if, by the perversion of the reasoning which led to this desirable result in England and in such colonies as are guided by

her laws, the British were the only soldier belonging to the several states in Europe, who was subjected to any code of foreign law, obtaining in the country to which his duty and the orders of his sovereign might accidentally call him. No parallel can be drawn, as none exists, between an English subject spontaneously placing himself under laws, the protection of which he seeks, and a soldier, in the course of duty, serving under the colours of his king and country. An Englishman, on assuming the military garb, though he incurs the responsibilities and duties of a soldier, does not divest himself of the privileges of a Briton, the greatest of which is trial by jury and by the laws of his country on the alleged infraction of any part of them. The flag under which he serves guarantees the continuance of those privileges, when ordered to places where foreign law prevails, to an ex-

court may be absolutely unknown and in opposition to the English constitution, and may consequently dispense law or apply punishments at variance with English law. A British officer and soldier is *now* exposed to any form of trial, even to the question, and to any penalties, which may be awarded by an arbitrary and foreign magistrate; the only condition is, that such judicature be appointed by, or under, the authority of Her Majesty, and does not declare itself incompetent [§ 166] to try him.

tent which cannot be possessed by an individual voluntarily, and with a private object, removing himself from the sphere of British law. Individuals are necessarily obnoxious to the laws of the country in which they may reside; but, as it is a *peculiarity* of English law that soldiers should be amenable to civil courts of judicature, it is surely no injustice to colonies or dependencies, annexed or ceded to the dominions of His Majesty, under the stipulation that they should enjoy their own laws, that this *peculiarity* of English law should not be grafted on theirs. By long usage, it has become a part and parcel of the law of every country in Europe, except England, that soldiers should be amenable to their own peculiar tribunals only, when criminally charged for civil crime. It is then but acting up to the very terms of a treaty to except British soldiers from the jurisdiction of the civil courts, to which soldiers under the laws in force previous to such treaty were not liable.

"It must be granted, as an abstract principle, that it is essential to the civil freedom and welfare of a community, that it should possess the power of trying and punishing, by its own laws, all offences committed against the public peace or social order. It may, therefore, be assumed to be an inherent right in all free states, that persons within their territories should be subject to their laws; but in the instance of soldiers holding possession of a country governed by a different system and code of law from that prevailing in their own, an exception must be admitted; for it must be borne in mind, that soldiers constitute in themselves a distinct and separate community, acting together, not for private, but for public ends, and subject only (exclusive of their civil and natural obligation to their country) to the will

of the prince for whose service they are engaged. If then the state in question claim the right of exercising jurisdiction over soldiers, to whom its protection is entrusted, it must be on the ground of special compact with the power whose sovereignty it acknowledges. The enquiry then resolves itself into the question, Does a prince, by refusing such privilege to a state under his protection, commit an act of injustice? In answering this question, the duty of the prince must be considered, as it relates not only to the country, but to the soldier. Both have claims on his justice; both have rights which he is called on to respect. To the country, he grants the free enjoyment of its own laws, protection from foreign invasion, and security from aggression by the soldiers in his service. To secure the last of these objects, military discipline may be deemed sufficient. On the other hand, a prince is obliged, by common justice and a fitting regard for his own dignity, to maintain the civil rights and privileges of his soldiers. Neither reason nor justice requires that a sovereign should delegate to courts of judicature, at variance with those established in his own country, and administered by magistrates ignorant of the rights and privileges of his people, the power of punishing them, or such of them as may have been brought within the ordinary limits of their jurisdiction, not by private interest or inclination, but by obedience to his commands. Had a soldier been subject to every code of civil jurisprudence, obtaining in colonies under the protection of the British flag, six months' service in the West Indies, during the late war, might have subjected him to almost every code known to the several kingdoms of Europe"—*First edition* (1830), pp. 22-32.

Questionable
policy of the
change.

77. On the surrender of a colony, good policy prescribes that the civil courts and magistracy should be reestablished as speedily as possible, and a few weeks, if not days, are ordinarily sufficient for these purposes; such civil judicature, then, if not in every sense in force by the appointment of Her Majesty, is clearly so, *under Her Majesty's authority*, and consequently, by the articles of war as altered, is rendered a competent judicature for the trial of a British soldier. The article of war in effect declares that a soldier shall be subject to any judicature, be it French, Spanish, Portuguese or Algerine, which may be in force "under the authority" of Her Majesty, although the judges who compose it shall, but the week before, have been reduced to the subjection of the crown by the arms of the very men who are thus subjected to their jurisdiction. The impolicy of rendering a soldier amenable to a foreign magistracy, and to laws at variance with those of his country, may be more observable, if it be supposed that the judicature, to which the soldier is rendered responsible, has been recently reduced to the subjection of the crown; but it is not the less unjust that a British soldier, serving under the British flag, and in defence of the laws and interests of his country, should, after the lapse of any period, be subject to any laws but British. If a colony be permitted to retain its foreign form of judicature, in deference to the prejudices of its people, the English soldier ought, as heretofore, to be exempt from the operation of such laws, so long as his residence in such colony is in the course of duty; if, on the other hand, a colony adopt English law; if the trial be by jury, and in the English language, such colonists, being admitted to the rights of citizenship, may be deemed eligible as magistrates or jury, to decide a question in which the rights of a Briton may be involved. It is surely anomalous to witness a British soldier, in the British uniform, serving under the flag which affords protection to, or *secures the obedience* of, a colony, pleading through an interpreter in the French or other foreign language; and if not submitted to the actual torture, yet importuned with questions, contrary to the spirit of all British law, by which to extort such replies as may excuse a decision of guilt.

78. M. Dupin, who wrote with much accuracy upon the

military strength of Great Britain, has well said : “Le gouvernement britannique a trouvé le secret de constituer une armée redoutable seulement aux peuples étrangers, et qui regarde, comme une partie de sa gloire, l’obéissance à l’autorité civile de sa patrie aussi, malgré les déclamations des démagogues et des prétendus réformateurs radicaux, qui cherchent à renverser la constitution, les citoyens les plus jaloux de leur liberté ne craignent point l’armée anglaise, telle qu’elle est maintenant organisée.” (3)

The author's
opinion of
the impolicy of
the change.

79. It is indeed true, that a British soldier feels it both his pride and his duty to maintain the integrity, and submit to the operation of the institutions of his country; but why does he so venerate her laws? It is that he believes them to be superior to all others, to be more conducive to real liberty, to control the vicious with the least restraint upon the well conducted, to afford the fairest trial to the accused, and to offer the most effectual remedy for restoring to liberty him who may be unjustly subject to restraint. Moreover, they are the laws which from his infancy he has been taught to respect, and in favour of which his prejudice is engaged. Can it, therefore, be good policy to render a British soldier indifferent to every form of civil jurisdiction, by subjecting him to all? If there were a design to prepare an army for the subversion of the laws, the civil authorities, and constitution of our country, and to meet the views of those men whom M. Dupin designates as demagogues and pretended radical reformers, could a plan be devised more suited to the end than to subject British soldiers to various codes of foreign law and various foreign judicatures? Is it not a natural result, that the soldier should speedily become indifferent to the preservation of institutions from which, by the policy of his country, he has ceased to derive advantage, except for the limited periods during which he may serve at home? Can interest actuate him to desire the preservation of laws, from a participation in which, for the greater part of his life, he is cut off in deference to the prejudice of foreigners? Must he not be convinced that, in the estimation of the government, the boasted superiority of British law is but ideal, or that his birthright to be tried

(3) Dupin, *Voyage dans la Grande-Bretagne, Force militaire*, 1825, ii. p. 35.

Questionable
policy of subject-
ing soldiers to
foreign laws.

by those laws, has been sacrificed to the expediency of gratifying newly-acquired colonies? Respect for the civil authorities of his country is at present characteristic of the British soldier: can that feeling be perpetuated if he become indifferent to the laws of Great Britain? Should he still retain a prejudice in favour of its institutions, will he not eventually feel jealous of privileges from which he is cut off; and is it not possible that he would, with less reluctance, lend his aid to the subversion or annihilation of the objects of his jealousy? M. Dupin said rightly, that a part of the glory of a British soldier consists in obedience to the civil authorities of his country; but the soldier can never be convinced that his glory or his honour is concerned in any obedience claimed for a foreign judicature. His feelings, as a soldier, will indeed lead him to submit, where submission is required by his military superior, but he will do so sullenly, and under the impression that the ties of military discipline have been distorted to deprive him of his birth-right.

CHAPTER III.

LAWS, RULES, REGULATIONS, AND CUSTOMS, REGULATING THE
ADMINISTRATION OF MILITARY LAW.

80. COURTS MARTIAL are regulated by the mutiny act and the articles of war, and by the general orders of the sovereign relating thereto, and extant at the time. Their practice is moreover regulated, in points where the written law is silent, and chiefly, as affects the award of punishment, and the form adhered to, by the "usage of the service," as recognized in the mutiny act (*sec.* 8), and by the "custom of war," which, as referred to in the oath taken by members, and as here used, must be understood of the customs and usages of the British army.

Written law of
courts martial,

and custom for
their guidance.

81. The several branches of the law of courts martial are in their degree, as will be pointed out [§82], declarations of the Royal pleasure, for though the Sovereign does not now exercise the government of the army as a personal function, the right of the Sovereign to the supreme command of the forces by sea and land is an undoubted principle of English law. The preamble of the act of the thirteenth year of King Charles the Second, chap. vi., which was passed on the 30th July, 1661, solemnly affirms that "within all His Majesty's realms and dominions, the sole supreme government, command, and disposition of the militia and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of His Majesty, and his royal predecessors, Kings and Queens of England;" and the part of the preamble in which these words occur has obtained a further significance, by having been excepted from repeal by the "Statute Law Revision Act, 1863," and "retained as a parliamentary recognition of the right of the crown to the supreme command of the militia and of all forces by sea and land." (1) This

The law of
courts martial
is the Queen's
law.

The Parliamen-
tary declaration,
at the Restora-
tion, 13 Car. 2,
c. 6,

as to the right
of the Crown to
the supreme
military com-
mand,

was expressly
excepted from
repeal, in order
that it might
stand on the
statute book.

(1) See the bill as brought from the Lords and ordered by the House of Commons to be printed, *page* 179 *column* 3. The entries in this column were intended to show the grounds of the proposed legislation, and to be struck out at a late stage of the bill.

This right is limited by law, and is exercised subject to the responsibility of the secretary for war in respect to the army.

The Queen's law for courts martial.
I. The mutiny act.

II. Articles of war.

III. Order in council.

IV. Royal warrants.

V. Queen's regulations and orders.

VI. General orders and circulars.

right, as all prerogatives of constitutional monarchy, is limited by law, as recited in the preamble of the mutiny act, and is exercised subject to the responsibility of the secretary of state, to whom, for the time being, Her Majesty entrusts the seals of the war department.

82. The highest exercise of the Queen's power of legislation is when Her Majesty enacts a statute by and with the advice and consent of lords and commons in parliament assembled. Hence the mutiny act [§ 85], as having the authority of the three branches of the legislature, is not only itself the most authoritative part of the law military, but is also the foundation of military law, as now obtaining, and more especially with respect to its exercise within the United Kingdom, although the superstructure, and the interpretation of it, as to military courts, rests solely with the crown. Next in order are the articles of war [§ 86], made by the Queen for the government of the army, which the statute requires to "be judicially taken notice of by all judges and in all courts whatsoever." The Queen also legislates by an order in council—as in respect to the land forces embarked in Her Majesty's ships [§ 43]—in this case deciding upon representations which are laid before her, by and with the advice of her privy council. Her Majesty also makes known her will and pleasure in Royal warrants, which may incidentally bear upon the practice of courts martial—as, for example, in the Royal warrant as to pay and promotion in respect to the president [§ 15]—and they become of force by the superscription of the sign manual, countersigned by a secretary of state. Her Majesty commands that regulations (2) approved by her should be circulated through the army and strictly observed on all occasions; and the commander in chief from time to time issues general orders and circulars to the whole army, which by reason of the authority conferred on him by Her Majesty, may have the effect of adding to, explaining, modifying, or rescinding paragraphs in the Queen's Regulations; and are absolute in their bearing upon the unwritten law. Last but not least—for the cus-

(2) Before 1837, these regulations were styled "The *General Regulations and orders for the Army*." On the issue of a revised edition in that year, when his late Majesty King William the Fourth signified his royal approbation, they were designated "The *King's Regulations*," and the precedent has been followed during Her Majesty's reign.

tomary law of courts martial is not, and ought not to be, left out of consideration in the framing even of direct acts of legislation—is the custom of war. And this too, although, from its very definition, it has not originated in any formal enactment, nevertheless, like the written law, is the Queen's law, not only inasmuch as it is expressly recognized by the written law [§80], and as it cannot be abrogated by any local authority, but because it continues to exist only as subject to the Queen's allowance, and liable, as to its particular details, to be overruled under Her Majesty's authority. (3)

VII. Custom of war.

83. There is, however, a well-established and most important rule as to the exclusion of any subsidiary regulations by subordinate authority, and any attempt at such local and partial legislation would necessarily be disregarded by members of courts martial in accordance with the terms of the court martial oath. In one case—and one case only—is any addition permitted to the several laws and regulations above particularized [§82], which either receive the personal sanction, or else are issued subject to the immediate control of the Sovereign, and consequently are binding upon the whole army, at home and abroad. Commanders in chief and other officers in local commands have authority, when convening courts martial, to give them instructions, and in that one case—as to sentence of solitary imprisonment—the article of war directs the court “to have regard to such instructions.” (4)

In certain situations convening officers may issue instructions as to solitary confinement, but

this is the one exception to the rule that officers in local commands cannot issue regulations affecting the sentence of courts martial.

84. The observance of this rule is watched with a most salutary jealousy not only as it prevents mischievous tampering with courts martial, but also because it guards against

This rule is a precaution against local irregularities,

(3) It would be difficult to find an example more entirely illustrating this legal position than recent regulations as to the “practice of the prisoner having a rejoinder to the prosecutor” which—at least at general courts martial—was referred to as “an irregularity” (G.O. No. 897, 9th Nov. 1866), and was not recognized in the Queen's Regulations of 1868 (Q.R. (1868) 772), although the “prisoner's right to speak last” had been immemorially allowed before courts martial. The fact that this was not “conformable to the practice of civil courts” had been adduced in the last century, as

an example of “the custom of war, the *lex non scripta* of the army”—and indeed the rejoinder held its ground as being, if not necessary, at least in some cases conducive, to the ends of justice before courts martial, inasmuch as they are essentially different in their composition from civil courts, and are held with such different accessories. See § 581 and Williamson, 2nd edit. (1783), Note, 113, there quoted at length.

(4) A.W.122. As to law at trials for civil offences, see § 72-79, and Chapter XXV.

and maintains
the Queen's
paramount au-
thority in respect
to military
legislation.

conflict of laws and regulations. (1) It has been pointed out that the mutiny act is the foundation of military law as now obtaining, and that the power of making subsidiary regulations for military courts, rests solely with the crown. The only ground, therefore, on which an order, issuing in the name of Her Majesty, and duly promulgated, could be, in any degree, questioned, would be in the most unusual case of a palpable discordance with, or rather contradiction to, the royal will embodied in some provision of the mutiny act or other enactment of the legislature. A court martial, in such case (which could only arise by inadvertence in the channel through which the Royal pleasure was conveyed), would consider the act of parliament as the true criterion of the intention of the Sovereign—in the case of the mutiny act, being bound by the oath (enjoined by the articles of war), to the letter of the statute. Upon a similar principle it has been held that an article of war, expressly dealing with a matter of penal discipline, overrules a Royal warrant; and that an article of war, dealing with the question of a soldier's service, was to be interpreted by a reference to the Army Service Act.

The mutiny act
continues in
force

between certain
fixed periods
at home and
abroad;

or abroad
without refer-
ence to these
dates, if pub-
lished in general
orders.

85. The mutiny act takes effect and continues in force, within Great Britain, from the 25th of April of one year to the same day in the following year; in Ireland, Jersey, Guernsey, Alderney, Sark and Man, from and to the 1st of May; in Gibraltar and the Mediterranean, Spain and Portugal, from and to the 1st of August; in all other parts of Europe where Her Majesty's forces may be serving, in the West Indies and America, from and to the 1st of September; India, and within the Cape of Good Hope, the Isle of France and its dependencies, St. Helena, and the western coast of Africa, from and to the 1st of January; in British Columbia and Vancouver's Island, from the day of promulgation until the 1st of January; and in all other places, from the 1st of February of one year to the same day in the ensuing year; but notwithstanding these specified dates, by a provision first introduced into the mutiny act of 1829, it becomes and is in full force beyond the seas from and after its receipt and promulgation in general orders. (2)

(1) This important principle has been signally vindicated by the addition made to the mutiny act of 1874, with reference to the "Indian Evi-

dence Act, 1872." See § 810.
(2) M.A.102. Q.R.S.2,p.22. See
also Q.R.S.22,p.22; C.R.17.

86. The articles of war continue in force from their receipt and publication, until revoked or superseded by others. Her Majesty, advised by the secretary of state for war, affixes her royal signature to these rules and articles, without the date or the counter-signature of a secretary of state; and thus authenticated, and printed by the Queen's printer, they are published by Her Majesty's command for the better government of all her forces *from a certain day expressed in the title.*

The articles of war are in force

from a certain date.

87. The annexation of the articles of war to the mutiny act, in the form to which military men are accustomed, is for their convenience, and to facilitate reference. They are not essentially inseparable. The mutiny act of 1831, which expired in Great Britain on the 24th March, 1832, was, by an act of parliament of that date, continued for one month at the several stations respectively. The articles of war were not again published to the army, but continued in force without any express declaration of His Majesty. General officers in command were informed, by letter from the adjutant general, that an (3) act had passed for continuing the mutiny act for one month, up to which period the court martial warrant in their possession would remain in force; but no mention was made of the articles of war, nor was this act ever communicated to the army.

Their continuance not dependent on that of mutiny act.

88. The question has been mooted: Were the mutiny act permitted by inadvertence to expire, would the articles of war expire also, and the army be *ipso facto* disembodied? or, would the articles still be obligatory on the forces of the crown, and the individuals composing the army be bound to serve till regularly discharged? The case has also been put: Were the new mutiny act not received, or the passing of it not known, at a station, at the period when the old one expires, are the articles of war in consequence inoperative, and the supreme military authority without the power of enforcing discipline?

Supposed case: the mutiny act having expired;

new mutiny act not received before expiration of old one:

89. This last question is one of moment to practical men—to officers who are responsible for the discipline of the troops under their orders, the case having frequently occurred abroad in former years, and having happened (4) within the

which has actually occurred.

(3) 2 Will. 4, c. 18.

(4) The mutiny act of 1831 expired in England on the 24th March, 1832, and in Ireland and the Channel

Islands on the last day of that month. The act for continuing the mutiny act was passed on the 24th March, and was communicated to the army by

United Kingdom since the provisions of the mutiny act, as to its duration, were modified in 1829, as regards places beyond the seas.

Consent of parliament not expressed.

90. Sir William Blackstone lays it down as the law, that the standing army is *ipso facto* disbanded at the expiration of every year, unless continued by parliament. (5) The preamble of the mutiny act rehearses that "the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland, in time of peace, unless it be with the consent of parliament, is against law." His dictum, therefore, as applied to standing armies within the United Kingdom, cannot be questioned; but he does not assert, nor is it to be inferred, that the army would be disbanded for want of a mutiny act, if the consent of parliament to its continuance were expressed, either by voting supplies for its support, or in any other way. The recruit under the authority of the law is attested to serve during the term of his engagement, provided Her Majesty should so long require his services; so long, therefore, as the keeping up that part of the army, to which a soldier may be attached, is not against law, so long does that law bind him to serve.

Practice immediately subsequent to the revolution.

91. The prerogative of the crown as to the keeping up a standing army was for the first time expressly limited by the declaration of rights at the time of the revolution; and the mutiny act from the first has recited the article, which declares that "the raising or keeping a standing army within the kingdom, in time of peace, unless it be with consent of parliament, is against law." Nevertheless, in the time of William the Third, the mutiny act was repeatedly suffered to expire; and, for the intervening periods (6), the army was governed, as before the abdication of King James the Second, by an exertion of the royal prerogative expressed in the articles of war. And as parliament was then especially jealous of a standing army, this is most observable, and all the more so, as the longest period, nearly four years, was in

letter from the adjutant general, on the 2nd April, so that in England and Ireland the troops were for all practical purposes without a mutiny act for some days.

(5) 1 Blackstone, 414.

(6) There was no mutiny act from

10th November, 1689, to 12th December, 1689; from 12th December, 1690, to 20th December, 1690; from 20th December, 1691, to 10th March, 1694; from 1st March, 1694, to 10th April, 1695; from 10th April, 1698, to 20th February, 1704.

time of peace,—after the conclusion of peace at Ryswick, when parliament did not interpose to provide any law for the government of the forces, although their numbers were limited by a specific enactment, the 9 Will. 3, c. 1, an act for disbanding the army. (1)

92. To pursue the argument as it affects the army within the United Kingdom, can serve no practical purpose. The question, as it concerns the portion of the army serving abroad, has always been one of less difficulty, since the very recital of the declaration that “within the United Kingdom, it is against law to keep a standing army, in time of peace, unless it be with consent of parliament,” is an indirect admission that it is *lawful* to do so *out* of the United Kingdom. The first mutiny acts which made any express provision as to the government of the land forces *out* of the realm were those passed in the reign of Queen Anne, and they especially provided that nothing contained therein should “extend to abridge Her Majesty’s power of forming, making, and establishing articles of war, and creating and constituting courts martial, and inflicting penalties by sentence or judgment of the same, in such manner as might have been done by Her Majesty’s authority, beyond the seas, in time of war, before the making of this act.” (2)

The power of the crown to make articles in the army abroad,

expressly laid down formerly.

93. The mutiny act of the current year does, in effect, recognize the same principle, by expressly enacting that it shall be lawful for Her Majesty to make articles of war, and by then providing that no person *within* the *United Kingdom of Great Britain, and Ireland, or the British Isles*, shall by such articles be subject to punishment extending to

The power of the crown to make articles for the army abroad, recognized in mutiny act,

(1) On the peace of Utrecht, the mutiny act was allowed to expire, which it did on the 25th March, 1713; but an act, 12 Anne, c. 13 (*al.* c. 12), “for better regulating the forces to be continued in Her Majesty’s service, and for the payment of the said forces and their quarters,” was passed on the meeting of parliament and came in force on the 25th July, 1713; this was followed by two similar acts, the 13 Anne, c. 3 (*al.* 12 Anne, st. 2, c. 2), in 1714, and the 1 Geo. 1, st. 2, c. 3, in 1715: the extreme punishment, provided under all these acts, was “not extending to life or limb;” this restriction was removed, upon occasion

of the rising in favour of the Chevalier, by the 1 Geo. 1, st. 2, c. 9, “An act for better preventing mutiny and desertion by enforcing and making more effectual an act of this present parliament, entitled ‘An act for the better regulating the forces to be continued,’ &c.” This act was succeeded in 1716 by the 1 Geo. 1, st. 2, c. 34, “An act for preventing mutiny and desertion, and for the better payment of the army and their quarters,” which was the first of the uninterrupted series of annual mutiny acts, which have passed from that year to the present.

(2) 1 Anne, c. 16, s. 37; 2 & 3 Anne, c. 20, s. 37, &c.

and acted on in
the existing
articles of war.

loss of life or limb, or to be kept in penal servitude, except for crimes which by the act are expressly made liable to such punishments. The offences defined in the fifty-third and three following, and the fifty-eighth articles of war, to which the punishments of death or penal servitude are annexed, are not to be found in the mutiny act: these articles, derived from the royal prerogative, were obligatory on the army until 1866, when [§10] Her Majesty was pleased to limit the application of the punishments to the crimes declared by the mutiny act to be so punishable; and similarly, all the other articles of war, in *foreign parts*, were then and consequently are now binding on Her Majesty's forces, apart from the mutiny act.

In certain cases
the soldier
would consider
the articles of
war as prolong-
ing the mutiny
act.

94. The oath of the members of a court martial refers to "an act now in force for the punishment of mutiny and desertion, and other crimes therein mentioned," (3) but independent of the clause added to the mutiny act, in 1829, [§85] providing that the act shall become and be of full force, anything therein stated to the contrary notwithstanding, from and after the promulgation of the act in general orders beyond the seas, the unrevoked articles of war would, to a certain extent, prolong the mutiny act to which they refer, and with which they had been circulated to the army.

Publication of
the articles of
war,

95. The second section of the articles of war, with certain other articles, which specify the most material duties and obligations of military men, and which contain a declaration of crimes and punishments, are required to be read and published at the head of every corps in the service, once in every three months. (4) An abstract of the most important duties and obligations, and of the penalties incidental to the commission of the most conspicuous offences, is inserted in the personal account book of soldiers. Every precaution is therefore taken, that a soldier may not be betrayed into crime from ignorance as to the penalty attached to it—the legal maxim, which rejects *ignorance of the law* as an excuse, can never be more justly applied than to the case of military delinquents.

Ignorance of the
law excuses not.

Courts martial
are regulated
by the acts and

96. Courts martial, on which officers of marines may be associated with officers of the army, or which may be com-

(3) A.W.152. (4) A.W.192. See also Q.R.8.7, p.11, and § 593.

posed exclusively of officers of either of these services may (5) be held for the trial of persons belonging to either of these services. When held for the trial of a person belonging to the army, they are regulated as if they were composed of officers of the army only, and the provisions of the mutiny act and articles of war are applicable to the proceedings; when for trial of marines, they are also regulated as if composed of officers of the land forces only, except that the marine mutiny act and articles of war are applicable.

articles of the service to which the prisoner may belong.

97. Offences against any former mutiny act or articles of war are punishable (6) under the existing mutiny act, subject to the limitation as to time [§52] already mentioned.

And by the act and articles then in force.

98. Courts martial, when supplying the place of courts of civil judicature, out of the Queen's dominions, at Gibraltar, or in other places in the Queen's dominions beyond the seas (except India) where there is no competent civil judicature in force, are bound to conform in the sentence to "the usages of English law in regard to the punishment of offenders;" (7) or, in India, to award such punishments as may legally be awarded by criminal courts in India. (8)

Courts martial supplying the place of courts of civil judicature are guided by the common and statute law;

99. Courts martial, held by armies in the field for the trial of followers of the army, should also be influenced by the spirit of English law, so far as the same may be applicable; though in many cases the custom of war, and especially as it is now formalized in the hundred and sixty-fourth article, can be the only justification of the particular nature of the punishment which it may be necessary to inflict. (9)

as are also courts held for the trial of followers of the army in the field as far as possible.

100. It has been debated whether, in conquered or ceded colonies, courts martial, exercising jurisdiction under a proclamation of martial law, (1) ought not, on the trial of

Whether courts martial, in case of martial law, in colonies are to be guided by the law of the place, or the law of England.

(5) A.W.164. M.M.A.13. M.A.W. 127.

(6) M.A.97.

(7) A.W.143, 145. See §75, 1052.

(8) M.A.101.

(9) See §72, 73.

(1) It has been observed [§12] that the origin of martial law is to be found in the law of the marshal court of our extinct military organization, and that its present form may be traced to a false etymology, and to the fact that it was the law "used in armies in time of war." It is only in comparatively recent times—dating from not long, if at all, before the be-

ginning of the present century—that it came to be generally used for the extraordinary exercise of martial or military law—when extended to persons not ordinarily subject to the articles of war [§35] in times of actual war or dangerous intestine commotion—as contrasted with military law and the statutory exercise of martial law in the army and navy. The old use is preserved in the preamble of the mutiny act; the letters patent of the Judge Advocate General [§1280-1]; and the warrants [§1255, 1262] for appointing provost-marshals.

non-military persons, to be guided, as to the sentence, by the laws ordinarily prevailing in those countries, though opposed to English law; and an opinion to this effect is said to have been given in the house of Commons, by Sir Robert Gifford, attorney general, and other members in the debate (2) on the sentence of the general court martial at Demerara, in 1823, on the Reverend John Smith, an Independent missionary. Several learned members, and especially Lord Brougham, in a most able and eloquent reply, contended for the opposite principle, showing, that as the court martial could have derived a jurisdiction from English law only, so ought its sentence to have been influenced by English law alone; (3) but it is remarkable, that he made no reference to the order of His Majesty of the 12th December, 1807, [§1053] which decided the point so far as a soldier was concerned, notwithstanding he set out upon the principle, which was not questioned in the course of the subsequent debate, that if Mr. Smith was amenable to the court martial at all, he was so *as a soldier*. Lord Brougham laid it down as an axiom, "that the proclamation of martial law renders every man liable to be treated as a soldier." (4) If then this be the law—if a civilian, under a proclamation of martial law, be amenable to courts martial *as a soldier*, a knowledge of the sovereign's pleasure in respect to the jurisdiction of such courts is indispensable to a right understanding of the question.

The proclamation of martial law extends the ordinary law of courts martial to civilians.

On the trial of soldiers English law only may be referred to;

101. Now there can be no doubt that the prerogative of the crown may be constitutionally employed in providing for the trial of members of the army, accused of offences not connected with military discipline, when the ordinary tribunals are superseded during the proclamation of martial law (a measure itself only justified by necessity), and also in Her Majesty's foreign possessions, where there may be no competent civil judicature in force.

and courts martial are required to refer to English law in all cases.

102. At the time of Mr. Smith's trial, the King had been pleased to make such provision, by an article of war applying to places beyond the seas, where there was no form of British civil judicature *in force*; and had, by the general order referred to above, [§100] declared the true intent

(2) Substance of the Debate on 1st and 11th June, 1824, published by the London Missionary Society, p. 196: re-

printed, 2 Hansard, xi.

(3) Subst. 236, 2 Hansard, xi. 1299.

(4) Subst. 18, 2 Hansard, xi. 976.

and meaning of the article to be, "that courts martial, exercising jurisdiction under it, were bound to award such punishments only as are known to the laws of England." The articles of war now *expressly* declare that, which this order had previously explained to be the meaning of the articles then existing; the law—as applicable to the present question—is identically the same now as then. The words *in force*, similarly employed in the old and new articles, are particularly to be noticed; for though there may be a form of civil judicature, yet, if it be not *in force*, an officer or soldier accused of any civil offence, which in England would not be punishable by a court martial, must, by virtue of the article, be tried by a general court martial. Such a case arises under the proclamation of martial law. The jurisdiction of the courts of the civil judicature being necessarily suspended, it is not *in force*, and consequently there begins the jurisdiction of courts martial over civil crimes committed by soldiers. In those cases, where a soldier is not amenable, in other circumstances, (5) to the civil courts, the law, or the mode of dispensing it, so far as regards a soldier accused of civil crime, is not altered by a proclamation of martial law. If, then, the statement of the law by Lord Brougham be correct, if "the proclamation of martial law renders every man liable to be treated *as a soldier*," there seems to be no doubt but that Mr. Smith was amenable to English law only.

103. The contrary position involves this apparent absurdity: in the event of the trial of two British subjects, for the same offence, under a proclamation of martial law, in a place ordinarily governed by *foreign law*—the one being a soldier, the other a civilian—the same court martial shall try the one offender, *being a soldier*, by English law; the other *as a soldier*, by foreign law; and, on finding them both guilty to an equal degree, and on an identical charge, shall nevertheless be bound to award a different punishment. It must be remembered that there is only one form of oath prescribed for members of courts martial, whether the court be held under a proclamation of martial law, or in the ordinary

Whether courts martial, during the proclamation of martial law in colonies, are to be guided by the law of the place, or by the law of England.

(5) At the time here referred to, offences, only when there was a form and until 1832 [§ 76], soldiers were of British civil judicature in force. amenable to civil courts for civil

course of martial law, or the law military. A member of a court martial swears that he will duly administer justice according to the articles of war and the mutiny act; and, if any doubt shall arise which is not explained by the said articles or act, according to his conscience, the best of his understanding, and the custom of war in the like cases. Conscience, therefore, informed by the application of the understanding to the subject, and guided by the custom of war, is the only rule by which to deal with cases not provided for in the articles and act. An officer is bound, by conscience, to make himself acquainted with the orders of his sovereign touching courts martial, and with the articles of war; these orders and these articles, in certain cases, refer him to the law of England,—of which, therefore, an officer may be expected to have a competent knowledge; but conscience will not impute any criminality to the absence of all knowledge of Dutch or any foreign law.

The author's opinion that the proclamation of martial law, merely extends the ordinary military law to persons not subject to the mutiny act.

104-9. The author cannot presume to say what may be the correct course to follow; but he is free to confess that, as a member of a court martial, so long as the oath [§441] for members, the mutiny act, the articles of war, and the orders of the sovereign continue such as they are, he could not, whilst awarding punishment on any trial by a court martial—and this whether the prisoner was a civilian or a soldier—be influenced by any law or custom, not to be traced to the articles of war, the mutiny act, the law of England, or the custom of war.

CHAPTER IV.

OF MILITARY CRIMES AND PUNISHMENTS.

110. THE ordinary jurisdiction of courts martial is limited, as already pointed out, [§ 30] to the trial of crimes and offences to the prejudice of good order and military discipline, declared by the mutiny act, or, in conformity with the provisions of the act, by the articles of war. Crimes, as here treated of, are acts—without reference to their moral quality apart from such legal prohibition—which the law has forbidden, and to which it assigns a punishment. These crimes may perhaps be most conveniently arranged according to the number of the article or of the section of the mutiny act, in which they are specified—under the seven following heads—with reference to the punishments which are annexed to them,—

Military crimes are here arranged according to the punishments to which they are liable.

- I. Peremptory Punishments, § 141.
- II. Death and Penal Servitude at home and abroad, § 169.
- III. Death and Penal Servitude abroad, § 200.
- IV. Penal Servitude, § 205.
- V. Fines for Drunkenness, § 211.
- VI. For other Crimes not capital, § 215.
- VII. For attempted Suicide, § 229.

A few observations will be appended upon some of the articles, but they will be very brief, as the offences specified in the written law are, generally speaking, clearly defined, admitting very little difference of opinion as to their meaning, and the proof, necessary to establish charges for them, being proportionably obvious.

111. The punishments awarded by courts martial are such as either are expressly enjoined by the mutiny act and articles of war, or “accord with the usage of the service.” (1) These are *peremptory*, that is, specially enjoined by the letter of

Punishments are either *peremptory* or *discretionary*.

(1) M.A.8. A.W.115.

the law; or *discretionary*, (2) that is, the court in its judgment applies such punishment as it may deem proportionate to the offence, the same being authorized by the mutiny act, articles of war, or by the custom of the service.

PEREMPTORY
PUNISHMENTS.

112. The peremptory punishments awarded by courts martial for military offences apply only to officers, [§ 143] the punishment of death being no longer peremptorily annexed to any offence by the articles of war. The only offences to which death is peremptorily assigned by the criminal law are treason, murder, and piracy with violence; but courts martial, where their jurisdiction is extended to these crimes, have a discretionary power by express proviso.

DISCRETIONARY
PUNISHMENTS.

113. Except on the conviction of the offences hereafter specified [§ 141-142], courts martial are not required to apply any prescribed punishment. In the case of military crimes by both officers and soldiers they award, at their discretion, such punishments (3) as accord with the provisions of the law, and are proportionate to the offence. They are specified, as they are applicable on conviction to—

I. Commissioned officers, § 114-117.

II. Non-commissioned officers and soldiers, § 118-125.

III. Non-commissioned and warrant officers, § 126-131.

Applicable to
officers.

114. The punishments for military offences, *applicable to officers*, established by the mutiny act or articles of war, or by the custom of the British army, which courts martial may, in their *discretion*, award on conviction, are:

Death.

Penal servitude.

In cases specially prescribed [§ 169]—*Death*, or *Penal Servitude* for a term not less than five years. (4) [§ 38] In the year 1853 the punishment of penal servitude was substituted, by the act 16 & 17 Vict. c. 99, in certain cases in lieu of transportation, the terms for years being considerably shorter. In 1857, by the act 20 & 21 Vict. c. 3, sentences of transportation were prospectively

(2) The word in old articles is "arbitrary." See Grose, ii. 110, &c.

(3) "Such other punishment as by a general court martial shall be awarded," and similar phrases in the forty-fourth, fifty-eighth, and hundred and third articles, must be understood to be limited by the usage of the service, and the general powers, as to punishment conveyed by the

mutiny act and articles of war.

(4) M.A.8. A.W.115, 116. In 1851 officers were liable to transportation for embezzlement only, but the general powers given to general courts martial, both by the mutiny act (M.A.8) and the articles of war (A.W.115), now extend to them equally with soldiers.

abolished altogether, and penal servitude substituted in all cases.

For embezzlement [§ 205]—*Penal Servitude*, and in this case only, *Fine*: or,

115. In the above and all other cases, *Imprisonment*, Imprisonment. with or without hard labour, (1) not exceeding two years; *Discharge with ignominy*; (2) *Cashiering, accompanied by* Cashiering. a declaration that the prisoner is unfit, or unworthy, or totally unfit and unworthy (3) to serve in any military capacity: to which has sometimes been added, that the prisoner's sword be broken over his head; (4) *Cashiering simply*; *Dismissal*; *Loss of Rank* either in the army Loss of rank. or regimentally, according to the date of commission of seniority, or in both. (5) With respect to officers of the Indian staff corps, *forfeiture* of all or any part of army Forfeiture of service in Indian staff corps only. or staff service, or all or any part of both; (5)

And—as substantive or as additional punishments—

Reprimand, which may vary in degree from public and Reprimand. severe to private; (6)

Admonition, which may be either public or private. (7)

116. The distinction between the punishments of cashiering and dismissal, is not invariably observed; but that a marked difference really exists, and ought to be borne in mind by members of courts martial in awarding sentence, may be learnt from the general order, 10th July, 1811, on the trial of Captain Barnes, 89th Regiment. (8) It is there

(1) M.A.8. A.W.115, 125. Neither the mutiny act, nor the articles of war, subject officers to imprisonment *with* solitary confinement. The power to award imprisonment *with* hard labour was first inserted in the seventeenth section of the mutiny act, and in the hundred and twenty-fifth article in the year 1869. Grose, writing in 1788 (vol. ii. p. 201), says that imprisonment was in a great measure, if not entirely, left off for officers; and Captain Williamson in 1783 (vol. ii. p. 119) speaks of imprisonment being "very little used" in our service; and it is believed that there is no instance of its being awarded within the present century by courts martial upon officers, except for embezzlement, and, in default of a civil tribunal, for civil offences.

(2) A.W.125, "offender" having re-

placed "soldier."

(3) G.O. 24th March, 1808. Sentence on Lieutenant General White-lock.

(4) G.O. 28th May, 1808. Sentence of court martial on Assistant Surgeon Thomas Talbot, 60th Regiment.

(5) A.W.125.

(6) A.W.125, and compare M.A.25.

(7) In cases at the discretion of the court, and which did not appear to call for the removal of the offender from the service, the suspension of officers from rank and pay for certain periods, as six or twelve months, was commonly resorted to by courts martial prior to 1815; but having been found productive of much inconvenience to the service, it was in that year forbidden by an article similar to the present hundred and twenty-fifth.

(8) G.O. 213.

DISCRETIONARY
PUNISHMENTS.Forfeiture of
decorations,when to be
awarded to
officers.

said: "His Royal Highness has not considered it expedient to give effect to the recommendation of the court in the prisoner's behalf, further than to mitigate the term of *cashiering* into that of *dismissal from His Majesty's service*."

117. The general terms of the hundred and seventeenth article of war—"any offender"—extend to an officer, and authorize his being sentenced to forfeiture of "any medals or decoration which may have been granted to him;" and there can be no doubt it would be the duty of a court martial to award the forfeiture in the event of an officer being convicted of desertion, sentenced to penal servitude, or discharge with ignominy, or found guilty of any crime which would, if committed in England, amount to felony;—these being the cases in which the hundred and sixty-eighth article "thereupon" subjects soldiers to the forfeiture. [§ 119]

Applicable to
non-commissioned
officers
and soldiers.

118. The punishments applicable to non-commissioned officers and soldiers, varying according to the powers of the description of court, before which they may be tried, all of them being applicable by a *general* court martial only, are—

Death.

Penal servitude.

Fine.

Corporal
punishment,
abolished for
offences on
shore in time of
peace,may be awarded
at sea or on
active service,

Death, in certain cases specially prescribed [§ 169]:

Penal servitude for a term of not less than five (1) years for all offences punishable by death [§ 169], and (as also a fine, [§ 206]) for those under the head of embezzlement. [§ 205]

119. In 1868 (2) it was enacted by the mutiny act, and the articles of war repeat the provision, that no court martial should, for any offence whatever during the time of peace within the Queen's dominions, have power to sentence any soldier to corporal punishment; but it was also provided that any court martial may sentence any soldier to *corporal punishment* while on active service in the field, or on board any ship not in commission, for mutiny, insubordination, desertion, drunkenness on duty or on the line of march, disgraceful conduct, or any breach of the articles of

(1) M.A.8. A.W.116.

(2) The punishments of marking with the letter D. (*Deserter*), and the letters B. C. (*Bad Character*), were abolished in 1871. The mutiny act of 1807 first gave power to mark a

deserter for "second desertion;" and this was extended to "desertion" in 1811. The marking with B. C. in the case of offenders discharged with ignominy was first introduced into the mutiny act of 1862.

war; and no sentence of corporal punishment shall exceed fifty lashes. (3) limited to fifty lashes,

120. Regimental or detachment courts martial cannot add any other punishment to a sentence of corporal punishment; but general, district, or garrison courts martial may award imprisonment *in addition*. (4) and by general or district courts martial in addition to imprisonment.

121. A general, district, or garrison court martial may sentence any soldier to *imprisonment*, with or without *hard labour*, and with or without "*solitary confinement*" (5) for any portion or portions of such imprisonment, not exceeding fourteen days at a time, nor eighty-four days in any one period of three hundred and thirty-six days, with intervals between the periods of solitary confinement of not less duration than such periods of solitary confinement." When the imprisonment awarded shall exceed eighty-four days, the court must expressly order that "the solitary confinement shall not exceed seven days in any twenty-eight days of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods." (6) No sentence of imprisonment can be for a period longer than *two years*. (7) When the imprisonment is solitary only, it cannot exceed *fourteen* days, whatever be the court awarding it. (8) Imprisonment with or without solitary confinement.

122. A regimental or detachment court martial may sentence any soldier to imprisonment, with or without hard labour, for any period not exceeding forty-two days, with solitary confinement for any portion or portions of such imprisonment, not exceeding fourteen days at a time, with an interval between them of not less duration than such period of solitary confinement. (9) Limitation of regimental courts martial.

123. A general, district, or garrison court martial may, in addition to any other punishment which such court may award, sentence any offender to all or any of the following *forfeitures*:—To forfeit absolutely or for any period not less than eighteen months any good-conduct badge or any good-conduct pay which such offender may have earned by past Forfeitures, good-conduct, badge and pay;

(3) M.A.22. A.W.118.

(4) M.A.23. A.W.119. The power to commute or mitigate a sentence of corporal punishment continues to be vested in the confirming authorities. See § 740, 769.

(5) In situations in which it may be impracticable to put in execution sen-

tences of solitary confinement, the convening officer may give the court instructions to that effect.—A.W.122, § 83.

(6) A.W.106. M.A.26.

(7) M.A.8. A.W.116. As to imprisonment of offenders already under sentence, see § 686.

(8) A.W.117.

(9) M.A.27. A.W.129.

gratuities and
decorations ;

pension for past

or future service.

Fines for drunk-
enness.

Deduction of
time whilst
prisoner of war.

Discharge with
ignominy.

Punishments of
non-commis-
sioned officers :

reduction, the
minimum sen-
tence ;

service :—To forfeit any annuity, gratuity, medal, or decoration which may have been granted to him :—To forfeit any advantage as to pension which he may have earned by past service :—To forfeit all right to good-conduct pay and to pension on discharge, whether in respect of past or future service. (1) Any court martial may fine [§211] for drunkenness.

124. The Mutiny Act of 1875 (*sec.* 50) repeals the corresponding provisions in the "Army Enlistment Acts" of 1867 and 1870, and enacts that unless it appear to the court martial, which enquires into the circumstances of the capture of a prisoner of war, that there has been no neglect on the part of the soldier, the time during which he has been so absent, shall be deducted from his time of service. (2)

125. General, district, or garrison court martial (3) may also, in addition to any other lawful punishment, sentence any offender to be *discharged* from Her Majesty's service *with ignominy*.

126. A non-commissioned officer, not being an army schoolmaster, [§129] may be reduced to the ranks by the sentence of any court martial, (4) and, upon being so reduced, is subject in addition to any of the above punishments which the court may award to a soldier, the mutiny act providing (*sec.* 67) that "All powers and provisions relating to soldiers shall be construed to extend to non-commissioned officers, unless when otherwise provided."

127. Courts martial are forbidden by the Queen's Regulations to award a sentence of reprimand to a non-commissioned officer, "such a sentence being applicable only to commissioned officers." (5) Practically, therefore, minor

(1) A.W.117.

(2) A.W.171. The provisions of the "Army Service Act" 1847 were the same in effect, but the deduction from the time of service was directed by the court martial.

(3) A.W.117.

(4) A.W.137. Before the year 1833 there was no provision in the articles of war for the reduction of non-commissioned officers by courts martial other than regimental; the power of general courts martial in this respect depended upon custom, as did also the power of courts martial generally to sentence non-commissioned officers to be *suspended* or *degraded*. Non-commissioned officers were not unfrequently sentenced to be

suspended, for a fixed period, from the rank and pay of non-commissioned officer, and to serve as, and upon the pay of, a private soldier. Precedents were not wanting, where non-commissioned officers, particularly sergeant majors and quarter-master sergeants, have been *degraded*, that is, have been sentenced to serve as non-commissioned officers in an inferior rank. In 1848 the sentence of a court martial, reducing a sergeant to corporal, was observed upon as irregular: and there can be no doubt that although it may not be contrary to the provisions of the mutiny act or articles of war, it would not be justified by the present usage of the service.

(5) Q.R.App.4.20. The old articles

punishments having been either ignored or forbidden by the regulations, the *minimum* (6) sentence of a court martial—a sentence, in many cases, of extreme severity—is reduction to the ranks.

and in many cases most severe ;

128. A sergeant or other non-commissioned officer, above the rank of corporal, reduced to the ranks, but not sentenced by the court martial to forfeit all or any part of his good-conduct pay, is allowed to reckon his service as non-commissioned officer as good-conduct service, and to receive the rate of good-conduct pay of such service, in addition to his pay as a private, subject only to the deduction of one penny a day for one year from the date of the offence for which he was reduced, or of the execution or the termination of the sentence passed upon him for such offence. (7)

but service as a non-commissioned officer counts as good-conduct service notwithstanding.

129. Army schoolmasters, in addition to the punishments which may be awarded to any soldier, may be sentenced to *dismissal*, or *loss of service*, but not to reduction. (8)

Special punishments applicable to schoolmasters.

130. A warrant officer may be tried by a district or garrison court martial, and may be sentenced to be *dismissed* from the service, or to be *suspended* from rank and pay and allowances for any stated period, or to be *reduced* to the bottom or any other place in the list of the rank which he may hold, or to be reduced to an inferior class of warrant officer, or, if he was originally enlisted as a private soldier and continued in the service until his appointment to be a warrant officer, to be reduced to the rank of a private soldier; or to be remanded to regimental duty in the rank held by him immediately before his appointment to be a warrant officer. A warrant officer may be sentenced by a general court martial to these and to such other punishments as such court is competent to award. But the articles of war provide that a warrant officer shall in no case be liable to corporal punishment. (9)

Punishment of warrant officers by district or garrison,

and general courts martial ;

proviso by articles of war.

of war (sec. 16, art. 22) had for a long series of years given authority for the discharge of non-commissioned officers "as private soldiers," as well as for their reduction, but this was omitted in 1829. Courts martial ceased to be authorized to deprive colour sergeants of their badge in case of misconduct in the year 1860; and the power to place a non-commissioned officer "at the bottom of the list of his rank" which had been given to courts martial in 1862 was struck out of the

article, now the hundred and thirty-seventh, in the following year.

(6) The court martial commission, in their second report (May 14, 1869), recommend, "5th. That the punishment of non-commissioned officers need not necessarily be accompanied by reduction to the ranks."

(7) R.W.924. Warrant to this effect, 8th May, 1851.

(8) A.W.137.

(9) A.W.128.

Punishment of
hospital
apprentices
in India.

131. A hospital apprentice in India may be sentenced by a general, district, or garrison court martial to be *suspended* from rank and pay and allowance for a stated period, or to be *reduced* to the lowest or any other place in the list of hospital apprentices, or to both of these punishments in conjunction, or to be *dismissed* from the service, as provided in the one hundred and twenty-eighth article of war.

ADDITIONAL
PUNISHMENTS.

132. In addition to any other punishment which the court may award, a court martial may further direct [§689] that "*any offender*" may be put under stoppages in the cases specified in the hundred and thirtieth article of war.

Stoppages.

Penalties
consequent
on conviction.

133. But before particularising the offences for which courts martial may *award* punishments on conviction, it will be well to recapitulate the penalties which, in certain cases are consequent on the conviction being confirmed, and therefore do not need to be specified in the sentence, being additional to any sentence which the court martial or other court may award.

Officer trans-
ported ceases
to belong to
service.

134. Every commissioned officer sentenced to penal servitude, when such sentence has been confirmed, thereupon ceases to belong to Her Majesty's service. (1)

All soldiers
forfeit pay and
service when
imprisoned
under sentence
or confined
previous to
conviction,

135. No soldier is entitled to pay, or to reckon service towards pay or pension, when in confinement under a sentence of any court, (2) or during any absence from duty by commitment or confinement as a deserter by confession, or under any charge on which he has been afterwards convicted. (3)

and during
desertion.

Soldiers enlisted
under the
conditions of
the act of 1867,
also forfeit the
same during
absence without
leave.

136. A soldier who shall be convicted of desertion shall forfeit his pay and service for the day or days during which he was in a state of desertion; and any soldier who enlisted, re-enlisted, or re-engaged subsequently to the passing of the Army Enlistment Act of 1867, or subsequently to its promulgation in general orders at a foreign station, shall, if convicted, also forfeit his pay and service for the day or days of his absence (exceeding five) without leave. (4)

(1) A.W.20. See §788.

(2) A.W.170. Officers undergoing sentences of imprisonment in India are allowed to draw *pay only*, but not their allowances.

(3) A.W.170. The new warrant omits the provision in that of 1866 (Art. 469), that if a soldier has been

absent from duty awaiting trial for a longer period than the eight days (then [§352]) laid down in the articles of war, the secretary of state for war might restore the service of the period exceeding the eight days towards good conduct pay and pension.

(4) A.W.172. R.W.541. See §191.

137. Officers, non-commissioned officers and soldiers entitled to any share in any prize or capture or grant on account of service, who desert, thereby forfeit the same to Chelsea Hospital, unless restored by royal proclamation or otherwise pardoned. (5)

Deserters forfeit prize money,

unless pardoned,

138. Soldiers convicted of desertion forfeit all moneys in the regimental savings bank; but the forfeiture may be remitted by the secretary of state for war. (6)

and moneys in savings bank, subject to remission.

139. Soldiers found guilty of desertion, [§ 185] wilful maiming or tampering with their eyes, [§ 219] the finding of the court martial having been confirmed,—sentenced to penal servitude or discharged with ignominy,—or found guilty of felony, or of any crime or offence, which in England would amount to felony—unless (as limited in 1875) the secretary of state for war otherwise direct,—thereupon forfeit all advantages as to good-conduct pay, and pension on discharge, which might have accrued from their *former* service, and also all medals and decorations for field service or good conduct, together with any accompanying annuity or gratuity. (7)

Soldiers convicted of desertion and other crimes, or sentenced to penal servitude, or discharge with ignominy,

forfeit former service,

medals and gratuities.

140. Every conviction by a court martial causes an entry in the regimental defaulter book, and the consequent forfeiture for twelve months of one good conduct badge, and of one penny a day, if the soldier is in possession of this distinction; or, if he is not, renders him ineligible for this reward for two years. (8)

Forfeiture of advantages under good conduct warrant, consequent on conviction by court martial, or by any other court of criminal jurisdiction, for felony.

141. The only offence now placed beyond the discretionary power of courts martial by the mutiny act, and *not* also specified in the articles of war, is:—

I.
PEREMPTORY
PUNISHMENTS.

M.A. 60. Unlawfully detaining any officer's or soldier's pay for the space of one month, or refusing to pay the same when due.

Detaining pay.

Upon proof of this offence, before a court martial, the act directs that the offender shall "be discharged from his employment, and shall forfeit one hundred pounds."

142. The offences declared by the articles of war punishable *peremptorily* on conviction, no discretionary power vesting in the court, are:—

Offences punishable peremptorily by the articles of war.

(5) 2 Will. 4, c. 53, s. 3.

(6) Royal Warrant—Savings Bank, para. 3.

(7) A.W.168, and see G.O. 77, 1st

October, 1874. As to restoration of service, medals, &c., see § 794.

(8) R.W.919-922.

PREMPTORY
ARTICLES.

- A.W. 34. Chaplain.—Misconduct, or vicious behaviour derogating from the sacred character with which he is invested : § 143
35. (M.A.96.) Perjury : § 146
39. Traitorous or disrespectful words against Her Majesty, or any of the royal family :
40. Being *concerned in any fray*, and disobeying an arrest, drawing upon, or offering violence to, another officer, *though of inferior rank* : § 147
44. Persuading to desert ; entertaining and not reporting deserter ; or not causing apprehension by civil power :
59. Sending flag of truce to the enemy without authority :
60. Giving a parole or watchword not received, *without good and sufficient cause* :
61. Spreading reports in the field calculated to create unnecessary alarm in the vicinity or rear of the army : § 148.
62. Using words in action or previous to going into action, *tending to create alarm or despondency* : § 148–150
63. *Producing effects* injurious to the service, by improper disclosures : § 148–150
64. Quitting ranks in action without orders, to secure prisoners or horses, or under pretence of taking wounded to the rear : § 153
65. Leaving guard, picquet, or post : § 199
Becoming prisoner by neglect, or disobedience, or passing outposts :
66. Seizing or appropriating, *contrary to existing orders*, supplies proceeding to the army : § 154
67. *Being in command* and conniving at the exaction of exorbitant prices for houses or stalls let to sutlers ; laying a duty, taking a fee, or being interested in the sale of provisions or merchandise brought into any garrison, fort, or barrack, &c. : § 155
68. Impeding the provost marshal, or *other officer* legally exercising authority :
Refusing to assist him in the execution of his duty : § 156
69. Breaking arrest : § 354
76. Drunkenness on duty *under arms* : § 157
79. Scandalous behaviour, unbecoming the character of an officer and a gentleman : § 158–159
84. Through design or culpable neglect, omitting or refusing to make or send a return or report ;—
Or *knowingly* making a false return or report
—to a superior officer, authorized to call for a return of report : § 160–161

A.W. 85. Making a false muster of man or horse; (9)

PEREMPTORY
ARTICLES.

Knowingly *allowing* or *signing* a false muster roll, certificate, or return; conniving at untrue documents; Concealing or omitting facts, directed to be stated, to excuse any officer or soldier from muster or duty:

86. By any false statement, certificate, or document, or omission of the true statement, attempting to obtain for any officer or soldier, or other person, any pension, retirement, half-pay, gratuity, sale of commission, exchange, transfer, or discharge:

87. Making or being privy to any false entry, alteration, or erasure in any account, description book, attestation, record, register, discharge, or other document, whereby the real services, causes of discharge or disability, wounds, conduct of, or sentence of courts martial upon, any person, shall not be truly given; Wilfully omitting to report or record facts relating thereto, according to *existing* regulations:

88. Intentionally making false return, report or statement of arms, ammunition, clothing, money, stores, or provisions;

By *false document*, conniving at embezzlement; § 162

By producing false vouchers, or in *any other way*, misapplying public money for purposes other than those for which it was intended: § 163

89. By concealment or wilful omission, attempting to evade the true spirit and meaning of orders and regulations relating to the foregoing points: § 164

91. (M.A. 87) Demanding unnecessary billets; quartering wives, children, or servants in houses, without consent of occupier; taking money to free from billets:

96. (M.A. 76) On application made for that purpose *wilfully* neglecting or refusing to deliver to the civil magistrate, or to assist in the apprehension of, officers or soldiers accused of crimes punishable by law: § 165–167, 224

97. Protecting any person from creditors, on pretence of being a soldier; protecting a soldier in any manner not allowed by the mutiny act. § 168

143. The peremptory punishment under these articles is confined to commissioned officers only, being in each case

Punishments
thereby pre-
scribed.

(9) The corresponding article of the (late) E. I. C. Army was worded "man or beast," which included ele- phants, camels, bullocks, &c., employed in the artillery and other services.

cashiering, except that applicable to a chaplain, on conviction under the thirty-eighth article—to be discharged.

The article for crying down credit, peremptorily prescribes

144. To the above offences, for which the articles of war peremptorily direct a specified punishment to be awarded by courts martial, may be added :—

A.W. 7. Commanding a corps and not crying down credit of soldiers, on its first coming to any place where it is to remain in quarters.

the penalty of suspension.

The article declares that “the said commanding officer, refusing or neglecting to do so, shall be suspended for *three months*, during which time his whole pay shall be applied to the discharging of such debts as shall have been contracted by soldiers, under his command, beyond the amount of their daily subsistence.” It is remarkable from its isolated position with respect to the penal articles, from its not pointing out how the penalty declared by it shall be enforced, and from its being opposed to the principle of the hundred and twenty-fifth article of war, the object of which is to prohibit the suspension of officers.

Suspension how enforced?

145. It is also remarkable, though the suspension of the officer is peremptory, yet that the *overplus* of pay may be returned to him. Although the infraction of the letter of this article is not infrequent, it would be vain to seek for precedent as to its application. It is doubtful whether the penalty declared by this article may be enforced summarily, or whether the intervention of a court martial is necessary to its enforcement; for, unlike other cases, where pay is interfered with, neither the article specifies the right of appeal, nor, as in the eighth article, directs that “the matter shall be enquired into, and, if necessary, tried before a competent court martial,” “if the officer . . . shall protest against such summary proceeding” [§367]. If a general court martial were charged to try the matter, the question would be, whether or not proclamation had been made within a reasonable time; which, perhaps from collateral passages in former articles of war, is generally understood to be four days; the court could have no power to award the suspension, nor any discretion as to the returning of the pay. The ordinary mode of making the proclamation is by a sergeant, with a drum and fife or trumpet, the sergeant

Crying down credit of soldiers.

Time and

mode of making proclamation.

halting at intervals and proclaiming that if the landlords or inhabitants shall suffer the soldiers to contract debts, it will be at their own peril, the officers not being obliged to discharge such debts.

146. *A.W.* 35, § 142.—The mutiny act of 1855 extended the ordinary jurisdiction of courts martial to perjury, and wilfully making a false declaration was inserted in 1857, but perjury only is specified in the article. Perjury is defined to be a *wilful* false oath, by one who, being *lawfully* required to depose the truth in any *judicial* proceeding, swears *absolutely* in a matter *material* to the point in question, whether he be believed or not; (1) and the charge should allege that such false statement was material to the issue before the court. (2) The false oath must be *wilful*, and proved to be taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than to the perverseness of the party, as where it was occasioned by surprise or inadvertency, or mistake of the true state of the question, it will not amount to perjury. (3) The oath must be *lawfully* required in a *judicial* proceeding. The law takes no cognizance of any false oath, but such as is sworn in some court of justice, or before some magistrate or proper officer, having power to administer an oath. When an oath is required by an act of parliament, but not in a judicial proceeding, the breach of that oath does not amount to perjury, unless the statute enacts that such oath, when false, shall be perjury, or shall subject the offender to the penalties of perjury. The mutiny act renders any person taking a false oath or declaration, in any case where an oath or declaration is required by it, liable to the penalties of wilful and corrupt perjury. (4) The *swearing* must be *absolutely* in a matter *material*. He who swears a thing according as he thinks, remembers, or believes, cannot, in respect of such an oath, be found guilty of perjury. (5) But a witness may be convicted of

Perjury,

in a matter material,

the false swearing must be wilful;

and lawfully required;

it must be absolute in a matter material.

(1) 1 Hawkins, 318.

(2) Judge Advocate General, 26th June, 1866. Q.R., App. C. 47.

(3) 1 Hawkins, 318.

(4) M.A.96. As to the required proof, see § 868, 1018.—The punishment of perjury and subornation of perjury

before a civil court is, by common law, fine and imprisonment, and, by statute, penal servitude not exceeding seven years, or imprisonment with hard labour.

(5) 1 Hawkins, 323.

Art. 35.

Prevarication
and subor-
nation of
evidence,
dealt with
as military
offences.

perjury in swearing positively that he *believes* a fact to be true which he must know to be false. (6) Officers and soldiers guilty of prevarication, or otherwise misconducting themselves in giving their evidence, [§439] may be dealt with under the hundred and fifth article, as also for the offence of persuading another to take a false oath, whether personally or by letter, by reward, promises, or threats, or by any other mode or means.

Disobeying
orders in case of
fray.

147. A.W. 40, §142.—In the articles of war, before the year 1829, the punishment of the offence described in this article was discretionary, and the present fifteenth article (which gives power to all officers of *what condition soever*, though of an inferior rank, to quell all quarrels, frays, and disorders, though the persons concerned should belong to another corps, and to order officers into arrest and soldiers into confinement) was joined with it, and formed the fourth article of the seventh section. To substantiate a charge under this article, so as to compel the peremptory punishment, it must be shown that the officer was concerned in the fray; and that he was ordered into arrest, and refused to obey the order; or, that he drew his sword, or offered violence to the officer ordering the arrest.

Spreading false
reports.

148. A.W. 61, 62 & 63, §142.—It may be observed as to the sixty-first article, that the violation of it consists in spreading, by words or by letters, reports calculated to create unnecessary alarm by spreading *such* reports. To convict on this article, as it stood until altered in the articles of war for the year 1835, it was necessary to prove that the reports were *false*, falsehood forming the essence of the offence; but it would be now sufficient to prove that the reports are calculated to create *unnecessary* alarm, although not necessarily false. (7)

(6) 1 Leach, 365. Taylor, 1225.
See also § 956.

Lieutenant S. H. found guilty.

(7) Lieutenant S. H., of the 43rd regiment, and Lieutenant J. H. of the 7th Royal Fusiliers, were together arraigned at Moimento de Beira, in June, 1812, for "conduct unbecoming the character of officers in spreading false and injurious reports tending to create alarm and terror among the inhabitants of Espenhal:" Lieutenant J. H. was fully and honourably acquitted;

The sentence was public reprimand. The sentence on a conviction upon a similar charge must, had the article now under consideration existed, have been cashiering: though, as in the case of Lieutenant S. H., the spreading false reports may not have arisen in malevolence, but with a view "to amuse himself at the expense of the terrors of the people of the country."—G.O. Villa Verde, 2nd July, 1812.

149. It is sufficient to maintain a charge grounded on the sixty-first and sixty-second articles to show that the words used have a *tendency* to create alarm or despondency. The offence defined in the sixty-third article is not complete unless a certain *effect be produced*; to procure a conviction under it, it is necessary not only to prove the disclosure of the numbers, position, magazines, or preparation of the army, for sieges or movements; but also that, by such mischievous disclosures, *effects* injurious to the army and the public service were produced. Though the article designates the disclosures as mischievous, yet it does not contemplate such conduct as an offence, until it create injurious effects, the result alone giving point to the act: without proof of the injurious effects produced by disclosure, a charge under this article must fall to the ground.

Arts. 61, 62, 63.
Improper disclosures, offence not complete, unless effect be produced.

150. It is probable that the sixty-first and sixty-second articles had their origin in the following order of the Duke of Wellington, dated *Celorico*, 10th August, 1810, or that they originated in the causes which produced it, as the express words of each article are in a great degree discoverable in it. The first part of the order having stated that some correspondence had been received from the army, which had occasioned considerable alarm at Oporto, proceeds: "The commander of the forces will not make any enquiry to discover the writer of the letters which have occasioned this unnecessary alarm in a quarter in which it was most desirable it should not be created. He has frequently lamented the ignorance which has appeared in the opinions communicated in letters written from the army, and the indiscretion with which these letters are published. It is impossible that many of the officers of the army can have a knowledge of facts, to enable them to form opinions of the probable events of the campaign; but their opinions, however erroneous, must, when published, have mischievous effects. The communication of that of which all officers have a knowledge, viz. the numbers and dispositions of the different divisions of the army, and of its magazines, is still more mischievous than the communication of opinions, as must be obvious to those who reflect that the army has been for months in the same position; and it is a fact come to the knowledge of the commander of the forces, that the

Order of the Duke of Wellington, probable origin of sixty-first and sixty-second articles.

Art. 61, 62.

Difficulties of an army in the field aggravated by imprudent communications.

plans of the enemy have been founded on the information of the description extracted from the English newspapers, which information must have been obtained through private letters from officers of the army. Although difficulties, inseparable from the situation of every army engaged in the operations of the field, particularly in those of a defensive nature, are much aggravated by communications of this description, the commander of the forces only requests that the officers will, for the sake of their own reputations, avoid to give opinions upon which they cannot have a knowledge to enable them to form any, and if they choose to communicate facts to their correspondents, regarding the position of the army, its numbers, formation of the magazines, preparations for breaking bridges, &c., they will urge their correspondents not to publish their letters in the newspapers, until it shall be certain that the publication of the intelligence will not be injurious to the army or the public service."

Officers may make communications, but must answer for results.

151. This order best explains the apparent deviation, in the sixty-seventh article, from ordinary penal enactments, which attach penalty to intention evinced by the result, rather than making it depend on the result itself. Officers, by the order, are not absolutely prohibited from communicating to their correspondents the positions and preparations of the army; they are rather led to reflect on the probable tendency of such proceeding, if persevered in indiscriminately. They are, however, strictly enjoined to urge their correspondents not to publish their letters in the newspapers, until it shall be certain that the publication of the intelligence will not be injurious to the army or the public service. The article of war, in unison with the liberality of the order, leaves officers in their discretion to communicate intelligence from the army, but justly makes them responsible for injurious results arising out of an abuse of this privilege. (8)

Using words tending to create alarm.

152. To support a charge grounded on the sixty-second article, the best proof is to establish the words charged as *used* previous to or going into action, and to show their tendency by the effect created; but it may be sufficient, where the effect is not demonstrable, to put in proof the

(8) See Q.R.S.6,p.45.

words, the tendency of which the court will judge. This article seems directed to cases similar to that which gave occasion for the third charge exhibited against Lieutenant Colonel the Honourable Thomas Mullins, in reference to his conduct before New Orleans, in 1815: viz. "for scandalous conduct, in having said to an officer of his regiment, on 7th January, 1815, when informed the 44th was destined to carry the fascines, &c.: *It is a forlorn hope, and the regiment must be sacrificed*, or words to that effect; such an expression being calculated to dispirit those under his command, to render them discontented with the service allotted to them, demonstrative of the feeling with which he undertook the enterprise, and infamous and disgraceful to the character of a commanding officer of a British regiment." On which the court found as follows: "that the prisoner, Lieutenant Colonel Mullins, did use the expressions set forth in third charge, or words to that effect; but the court do find that those words were not used in the sense, with the view, or with the evil intention, or consequences, imputed in the said charge; the court do, therefore, most fully and honourably acquit the prisoner, Lieutenant Colonel Mullins, of the said charge and all criminality thereon." (9) Two remarks naturally present themselves. Under the old articles of war, it would have been difficult to have charged the words, proved to have been used by Lieutenant Colonel Mullins, in any other way than in that actually set forth; the imputation *scandalous* might perhaps have been modified to the epithet *unofficer-like*. As the offence now declared by the sixty-second article did not then exist, premeditated or malicious intention must have been proved before punishment could have ensued upon the use of any words however detrimental to the service by their tendency to create alarm or despondency. Under the present articles of war a sentence of cashiering must inevitably have followed the finding of the court, on the third charge to the extent declared in the sentence.

Art. 62.

Case of Lieut.
Colonel Mullins;

remarks thereon.

153. A.W. 64, § 142.—This article was added in 1829, and is framed upon a general order issued by the Duke of Wellington at Elvas, 3rd June, 1811, and ordered by him to be read at the same periods as the articles of war.

Quitting ranks

Art. 66.
Seizing supplies
for the army,

contrary to
orders;

order of the
Duke of
Wellington.

Officers con-
cerned in traffic.

Impeding

154. *A.W.* 66, § 142.—This article admits of no discrimination as to punishment by the court martial; the irregular detention, seizure, or appropriation of supplies proceeding to the army, *contrary to orders issued in that respect*, being proved, the court is required peremptorily to award cashiering; any alleviating circumstances, even amounting to the destitution of a corps or detachment, can only be taken into account by the approving authority. It must be observed, that irregularly detaining or appropriating, unless it be “contrary to the orders issued in that respect,” does not amount to the offence contemplated by this article, but may be tried and punished in the discretion of the court as prejudicial to good order and military discipline. This article was introduced in 1829; it appears to have been framed to meet the irregularities referred to in the following general order of the Duke of Wellington, dated Arganil, 20th March, 1811: “The commander of the forces is concerned to hear that some of the regiments, coming up in the rear, have forcibly seized on the supplies, on the march, for those in front, in consequence of which these last have been deprived of them. Those who stopped and seized those supplies should reflect, that it is most easy to supply the troops nearest to the magazine, whilst those nearest the enemy require the supplies with the greatest urgency. It is besides quite irregular, and positively contrary to the orders of this army, for any commanding officer to seize supplies of any description; there is a commissary attached to every part of the army, and there is no individual, much less regiment, for whom some commissary is not obliged to provide. It is necessary that this practice should be avoided in future, otherwise it will become impossible to carry on any regular operation.”

155. *A.W.* 67, § 142.—This article was framed in consequence of some gross abuses in the middle of the last century at Gibraltar. The garrison was supplied exclusively by contractors under the control of the governor—a system which led to much robbery and oppression. (1)

156. *A.W.* 68, § 142.—The corresponding article was

(1) *Sayer, History of Gibraltar*, 466-473.

added to the new articles of war of 1829, and was the reinsertion of an offence, as a "crime not capital," which in one form or another is to be found—and in most cases as a capital offence—in successive issues of laws and articles until the reign of George I. The provost marshal, or "provost of the marshal" as he is also, and more precisely, called in the laws of war of Henry VIII., was charged, under the order of the marshal, and afterwards of the general, with the police of the camp and the execution of the sentences of his court. The "resistance of justice" was punished capitally, or "at the king's pleasure," in the fifteenth century. "Resisting the provost marshal" was punished by death by the articles of both the contending armies in the civil wars of the Great Rebellion. The fifty-fifth article of King James II. is as follows, and it was retained with unimportant verbal alterations as the sixty-third article of William III. and the fifteenth of Queen Anne:—"ART. LV. No officers or soldiers shall presume to hinder the provost martial, his lieutenant, or servant in the execution of their office upon pain of death, or such other punishment as a court martial shall think fit: And all captains, officers, and soldiers shall do their utmost to apprehend and bring to punishment all offenders, and shall assist the officers of His Majesty's army or forces therein, especially the said provost, his lieutenant, and servant; and if the provost martial or his officers require the assistance of any officer or soldier in apprehending any person, declaring to them that it is for a capital crime, and the party escape for want of aid and assistance, the party or parties refusing to aid or assist shall suffer such punishment as a court martial shall inflict." This old article may very well serve to illustrate the present one, which does not appear to have been intended to apply to offences which might more properly be tried as offering violence against, or disobeying the lawful command of, a superior officer, but rather to meet the case of officers and others hindering or not assisting the provost marshal, or other officer—it may be of inferior rank—who might be "legally exercising authority" "in the execution of his duty" in the apprehension or

Art. 68.
provost marshal
or other officer
in the execution
of his duty

"The penalty of
hindering the
provost marshal
in the execution
of his duty."

"The penalty of
not assisting
him."

Art. 76.

punishment of offenders, and the preservation of good order and discipline, as enjoined by the article of war. (2)

Drunkenness on
duty under arms.

157. A.W. 76, § 142.—*Drunkenness on duty under arms* is the only offence contemplated by this article: drunkenness in an officer off duty, or on duty, *not under arms*, is punishable in the *discretion* of the court under the hundred and fourth article. It is held that the offence of being drunk on duty is complete, when an officer or soldier is found drunk, whether under the influence of liquor, opium, or other intoxicating drug or thing.

Drunkenness
how arising.

Scandalous
conduct.

158. A.W. 79, § 142.—This article which is essential to the high respectability and honourable character of the army, by providing for the removal from it of officers who may be guilty of scandalous behaviour, unbecoming the character of an officer and a gentleman, although not immediately bearing on its discipline, is in its nature widely comprehensive. It is spoken of when referring to the specification necessary in the charge, [§410] and will be again noticed when treating of the general rule: *It is sufficient to prove the substance of the issue or charge* [§831]. No offence is within its peremptory provision, which cannot be designated "scandalous," as well as unbecoming the character of an officer and a gentleman, the definition not admitting of separation of its terms. (3)

The peremptory sentence under this article is not imperative on the court, unless the crime described in it is expressly charged and found.

159. In cases which arose from the now obsolete practice of inserting a statement in the charge of the crime being in breach of some specified article of war, it was held that if a charge should *expressly refer* to this article, a finding which negatived the imputation of scandal, and of conduct unbecoming the character of a gentleman, must necessarily be followed by acquittal, even though the accused were guilty of conduct unbecoming the character of an officer. It does not however follow where charges are framed in its precise language, that conduct not justifying the imputation of scandalous, but which in the opinion of the court may be to

(2) A.W.164.

(3) The article for a long series of years had been worded "scandalous, infamous," but this last epithet was expunged in 1867 at the suggestion of

Sir David Dundas, then judge advocate general, upon the ground that this accumulation of epithets was contrary to the spirit of the hundred and sixty-second article. [§433]

the prejudice of good order and military discipline, should go unpunished: the court would still be in a position to take cognizance of the offence according to its nature and degree, but would in this case, *at their discretion*, award a punishment, and *not necessarily* cashiering, which they are imperatively called upon to apply in every case, only when the offence described in the article has been expressly charged and found. Every possible act, which an officer can either commit or omit, to the prejudice of good order and military discipline, in whatever degree, may and must meet its proportionate punishment, when charged as conduct unbecoming an officer, and proved before a court martial; (4) but offences against morality and decorum, or the refined feelings of a gentleman, if not directly affecting military discipline, to be punishable by a court martial, must deserve the epithet, scandalous, and then can be visited only by cashiering, and that by virtue of this article.

Art. 79.

Misconduct, not subversive of military discipline, can be tried only if within the terms of this article.

160. A.W. 84, § 142.—The offence in the first part of this article,—*Through culpable neglect omitting to send a return, &c.*—might have been punished by the old articles of war in the discretion of a court martial. The present article appears very vague and too general in its terms to entail peremptory punishment by cashiering. Any neglect, even the slightest, without any criminal intention, is to a certain degree culpable; indeed it is difficult to discover why the epithet *culpable* should have been applied at all to *neglect*, or how neglect can arise which is not culpable. An omission may be venial, but not so a neglect. To establish a charge under the latter part of this article, it would be necessary to prove, not only that the return was false, but that the officer knowingly made a false return. This offence was punishable peremptorily under the old articles of war by cashiering. (5)

Designedly omitting to send return, or

making false return, but

guilty knowledge must be proved,

161. To convict under this article it must be shown that the superior officer was authorized, either expressly or by the custom of the service, to call for the return.

and the authority of the superior officer.

162. A.W. 88, § 142.—The second of the three charges

False return

(4) See cases of Lieut. Dunkin and Capt. Gibbs. § 840-42. (5) A.W. (1826) Sec. v. Art. 1.

Art. 92.
of stores; con-
niving at
embezzlement.

upon which an officer is peremptorily punishable under this article—*being concerned in or conniving at*, by any false document, *any fraudulent embezzlement* of stores—also falls under the eightieth article, which authorizes the award of the punishments of penal servitude, fine, imprisonment, &c., or that of cashiering; but as the eighty-eighth article of war is imperative as to the penalty, a charge couched in its express terms (6) *must* be visited by cashiering. (7)

Misapplication
of public money.

163. The same remark applies to the offence which is subjected to the peremptory punishment under the last part of this article, *by producing any false certificates or vouchers or accounts, or in any other way misapplying the public money, for purposes other than those for which it was intended*. It may be observed that the offence here described differs from that within the discretionary, but more penal, provisions of the eightieth article, inasmuch as the misapplication need not be *fraudulent*: a simple misappropriation of *public* money intended for any specific purpose—the discharge of one *bonâ fide* claim with moneys *intended* for another—might subject an officer to the peremptory penalty.

Evading orders
relative to
muster, &c.

164. *A.W.* 89, § 142.—This article extends to any evasion, by concealment or wilful omission, of the spirit and meaning of the orders and regulations relating, as the article expresses it, to the “*foregoing points*.” This must be understood of the *points* comprehended by the eighty-fourth and following articles, and may be held to apply to all existing orders as to returns, musters, pay lists, reports relative to the retirement of officers, or the discharge and pensioning of soldiers, and as to returns of stores, and the application of public money.

Neglecting or
refusing
assistance to
civil magistrate,
on application
made.

165. *A.W.* 96, § 141.—It is supposed that officers may commit a breach of this article, not only when serving in the United Kingdom, and in such British colonies as have a

(6) The eightieth article extends not only to connivance by means of *false documents*, but also to connivance in any way by a person in trust.—*See* § 200.

(7) As this offence is within the terms of the seventeenth section of the

mutiny act, the loss and damage sustained is recoverable, as therein pointed out, the court being in every case required to ascertain the amount, and to declare by their sentence, that it shall be made good by the offender.

form of British civil judicature in force, but also, since the alteration in the articles of war in 1832, which has been referred to when treating of the jurisdiction of courts martial [§ 75-9] in colonies or possessions, in which, being under British protection, or having become British by conquest or cession, the law of the country, from which the first settlers were drawn, or some foreign law, or a modification of such laws, may have been preserved to them, provided only there is any civil judicature in force by the appointment or under the authority of Her Majesty, and that such judicature does not declare its incompetence to take cognizance of crimes and offences committed by officers and soldiers. Art. 96.

166. The words "*competent to try such offender*" were inserted in the hundred and thirtieth article in the articles of war for 1851—and not before they were needed. In the previous year, the chief law officer of the crown in the Mauritius, where French laws remain in force, declared that the *civil* law was incapable of dealing with a murder committed by a soldier, who subsequently underwent the sentence of death awarded by a general court martial. Modification of the article to meet such cases abroad

167. The very important words "on application made to him for that purpose" were added in 1854, and serve to protect officers from a charge of neglect, under this article and the seventy-sixth section of the mutiny act, for preferring charges for such criminal offences before courts martial, as are also punishable under the articles of war. The additional punishment prescribed in the mutiny act—disability to have or hold a civil or military office—applies only to the conviction of a commanding officer on a prosecution for the offence in the superior courts at Westminster, Dublin, or Edinburgh, or a court of record in India. and at home.

168. *A.W.* 101, § 142.—This article will be best understood by a reference to the fortieth and hundred and seventh sections of the mutiny act, which has been progressively modified for the purpose of preventing the Queen being deprived of the services of soldiers, except in those cases which are contemplated by it. Illegally protecting from arrest.

II.

Crimes punishable by death and penal servitude, at home and abroad.

Crimes punishable by death; whether at home or abroad.

169. The penalties of *Death* (8) and *Penal Servitude* are attached to the following offences, committed either by officers or by soldiers when tried by general courts martial (1), and whether committed at home or abroad, they being expressly made liable to these punishments by the mutiny (2) act:—

M.A. 15. Treating, or entering into terms with a rebel or enemy, without Her Majesty's licence, or the licence of the general, or chief commander. (3)

A.W. 36. Beginning, exciting, causing or joining in mutiny or sedition;

Being present and not using utmost endeavours to suppress mutiny or sedition;

Conspiring to cause mutiny: § 170

Knowledge of mutiny or intended mutiny, and delaying to inform the commanding officer thereof: § 171

37. Striking, using, or offering violence against a superior officer, being in the execution of his office: § 172–175
Being confined in a military prison, and striking, using, or offering violence against a visitor, or other his superior military officer being in the execution of his office: § 176–177

38. Disobeying the lawful command of a superior: § 178–179, 595

42. Desertion: § 180

51. Holding correspondence with, or giving intelligence to the enemy;

Relieving the enemy with money, victuals, or ammunition; or knowingly harbouring, or protecting, an enemy: § 194

52. Misbehaviour before the enemy: § 195

Shamefully abandoning or delivering up any garrison, fortress, post, or guard: § 196

Compelling, or speaking words, or using other means, to induce the abandonment of any garrison, fortress, post, or guard: § 195

(8) The articles of war of King James the Second provided that no punishment extending to loss of life or limb should be inflicted on any offenders in time of peace, although the same were allotted for the said offence by those articles and the laws and customs of war.

(1) Desertion may be tried by a district court martial; and mutiny and

insubordination accompanied by personal violence on the line of march, or on board ship, may be tried by a regimental or detachment court martial.

(2) M.A. 1 and 15. For other offences to which death is annexed in the articles, see § 200.

(3) There is not any parallel article of war.

57. Sentinel—Sleeping on post, or leaving it before being regularly relieved : § 199 Art. 36.

170. A.W. 36, § 169.—The crimes of mutiny, and of not suppressing or concealing a mutiny, were specified in separate articles in the old articles of war, but were included in this article from the time of the revision of the articles in 1829. Conspiring to mutiny was for the first time expressed in the mutiny act of 1867, in consequence of the inconvenience which had been felt in framing a charge for what was virtually this offence, as “coming to the knowledge of an intended mutiny” when this was in fact merely an incident in the conspiracy. Mutiny and sedition are, by some, considered as convertible terms, and perhaps properly so; but by military men *mutiny* is rather understood to imply extreme, and, more strictly speaking, collective insubordination, or rising against or resisting military authority in combination or simultaneously (4), with or without actual violence, such acts proceeding from alleged or pretended grievances of a military nature: and *sedition* is supposed to apply to acts of a treasonable or riotous nature, directed rather against the public peace and the civil authority than military superiors, though necessarily involving or resulting in insubordination to the latter. The facts, by which it is intended to substantiate a charge of mutiny or sedition, should be set forth in the charge. The offence must be proved by acts, not by words alone, or by words at all, except in connection with acts, since even traitorous words against Her Majesty are not punishable, as is mutiny, by death. (5)

Mutiny, and the offences comprised in the article.

Definition of mutiny.

Facts should be set forth in charge;

evidence to prove.

171. From the earliest periods of our military history a distinction has been maintained between *mutinous conduct*

(4) In the old articles of war the offences which are now distinguished as “mutiny and insubordination” were classed together as *mutiny*; and the general orders of the Duke in Spain and Colonel Hough's *Collections* will furnish many examples of men shot for isolated acts of violence charged as “mutiny,” e.g. “shooting a superior officer in the execution of his duty.” In this and other instances the act so charged and proved came within one of the offences to which the mutiny act had attached the punishment of death; and there can be no doubt that the designation of these

acts as mutiny was at that time fully authorized by the classification of the article of war. Now, however, that the less accurate arrangement of the articles of war has been amended in this particular, there does not appear any reason why these precedents should be followed, and *mutiny* should not be used in its more distinctive signification of combined, or, at least, simultaneous rising against, or resisting, authority, on the part of more than one man only.

(5) A.W. 39. See *Acts and Declarations of Co-mutineers*, § 821-3.

Art. 36.

Mutinous conduct distinguished from an act of mutiny.

and *mutiny*; and the penalty of death cannot be awarded on a charge of *mutinous conduct*. (1) Nothing less than mutiny, expressly charged and satisfactorily proved, will justify the sentence of death or penal servitude. Mutinous conduct implies behaviour tending to mutiny; and just as a man, who has committed an act of a murderous character may not have completed, or may not have formed the intention to commit that crime, so a soldier, whose conduct is evidently of a mutinous character, may yet be clear of the completion or commission of that offence.

Violence to superior

in execution of office,

or at other times;

including non-combatants,

172. A.W. 37, § 169.—The article now extends to every sort of violence, or attempt at violence, (2) which may be used or offered against *superior officers*, with whatever circumstances they may be *in the execution of their office*. It is held to be the intent and meaning of the mutiny act that, whenever they are answerable to the law for a neglect of duty, the law will extend its protection to them. (3) Violence to a superior in other circumstances, or threatening language, are minor offences, punishable under the forty-first article of war. [§ 215*, 259]

173. The protection of the law is extended to officers having relative rank (4) in regiments or military depart-

(1) Private J. Midgeley, Royal Fusiliers, having been tried at Malta and sentenced to be transported for fourteen years upon a charge of "highly insubordinate and mutinous conduct" in using threats against the life of a sergeant, and having a firelock loaded with the avowed intention of shooting him, the general commanding in chief wrote as follows to the major general commanding:—"I have to acquaint you that the sentence awarded by the court and approved by you could not legally be enforced, inasmuch as neither the charges against the prisoner, nor the evidence in support of them, constitute an offence punishable with death, within the intent and meaning of the mutiny act."—*Horse Guards*, 26th July, 1834.

(2) "Offer of violence" implies "any threatening act or gesture amounting to an attempt to use violence."—Q.R. App. C, charge 6. See § 1139n.

(3) The following notification was issued on the 1st February, 1868:—"It has been ruled that a non-commissioned officer while with his regiment

or any part of it is, at all times, to be considered in the execution of his office."

This was incorporated in the Queen's Regulations (App. C, charge 6) on their issue in 1873, and the ruling thus promulgated by authority must always have its due weight in those cases where it was intended to apply—obviously not when there is no doubt as to the fact of the non-commissioned officer not being in the execution of his office—to instance a case which has occurred—when in the act of attempting to commit a felony when on duty with his regiment.

Probably no more is intended by this ruling than that it is not necessary that the non-commissioned officer should be in the *active* discharge of his duty; and that, for example, a corporal asleep in the barrack room or tent of the squad of which he was in charge, and becoming the object of violence, should be within the protection of the article.

(4) Private Henry Hamilton, 62nd Regiment, was found guilty by a

ments; and to private soldiers holding lance rank (5) as bombardiers or corporals. It is, however, an inseparable part of the graver offence contemplated by this article, that the violence be offered to a superior officer *in the execution of his office*. To subject an offender, therefore, to the grave punishments contemplated by it, it is necessary, not only to prove that the violence was offered to or used against the *superior in the execution of his office*, but also, that this circumstance should be specifically alleged in the charge, or, *at the least*, that facts should be set forth, from which it might be collected. The omission of this allegation, in a very aggravated case [§406], caused the revision of a sentence and the substitution of corporal for capital punishment.

174. There would be some difficulty in accurately defining what is meant by being *in the execution of his office*, which was not necessary to the offence, as specified in some of the early mutiny acts, and the still earlier articles of war. Unquestionably an officer would be in the execution of his office, whether the act of duty was a prescribed duty, or a duty arising out of the exigency of the moment. For example, to use a familiar illustration, an officer seeing a soldier out of quarters after hours, or improperly dressed in a town, or transgressing against any order or custom of the service, would be in the execution of his duty, and therefore of his office, in ordering the soldier to his barracks, or directing such steps as may be necessary. It would perhaps be going too far to assert, that an officer present with his regiment is perpetually on duty, and consequently in the execution of his office, because it may be imagined that, in social intercourse, violence may be offered to a superior, which clearly could not be charged under this article, though it is equally clear that it is the duty of all officers to quell all quarrels, frays, and disorders; and consequently, if at the

Art. 37.

acting bombardiers, and lance corporals.

The execution of the office is an inseparable ingredient of the crime.

Execution of office :

general court martial at Aldershot on the 28th April, 1865, of having, when undergoing medical inspection, "struck with his fist Surgeon Major J. Ewing, being his superior officer, and in the execution of his office." He was sentenced to penal servitude for five years, and the sentence was confirmed by the Queen.

(5) "I have it in command to say, that a lance corporal is in all situations

and under all circumstances while holding the lance rank, to be regarded and denominated as a non-commissioned officer for the time being, and that his authority as a superior, is, to all intents and purposes, as valid, whilst acting in the capacity as corporal, as if he were a commissioned officer of the regiment."—*Adjutant General, Horse Guards, 22nd June, 1844.*

Art. 37.

when an officer
must be
considered to
be in.

mess-table, or in a private room, an officer, in the performance of this duty, encountered violence from an inferior, the offender might be exposed to capital punishment, by alleging that the *superior* officer was in the *execution of his office*.

Whatever the regulations or customs of the service require in an officer, it is the duty of the officer to perform; and whenever the good of the service requires that he should interfere, it is his duty to interfere: in such cases the officer is in the execution of his office, and entitled to the protection of the law. No officer, of any standing, will be under any difficulty in deciding whether an officer was in the performance of his duty upon any given or assumed occasion. Were an officer in the execution of accidental or *general* duty, he would undoubtedly be in the execution of his office. But if a doubt exist on this point, the offence cannot be capital, but is punishable under the forty-first article, as now enlarged, as it was before under the article "*All crimes not capital*."

The rank of
the officer must
be known.

In plain
clothes.

175. It may be observed that to constitute this offence, it must appear that the offender was aware of the rank or superiority of the superior. A case has arisen in which it has been asked: Can an officer be in the execution of his office in plain clothes? No military man, of any experience and reflection, will hesitate to answer, that an officer may be in the execution of his office in plain clothes. We will assume a case, which has, in our own experience, repeatedly occurred; it may serve to exemplify a point on which it may be desirable to leave no doubt. We will suppose an officer returning from shooting or boating, of course in anything but regimentals,—that he encounters a soldier of his regiment or company committing some flagrant breach of good order; it is unquestionably his duty to interfere, and to order that soldier to desist or to go forthwith to his quarters. The soldier knowing his officer and drawing his side arms on him, or in any other manner offering him violence, would expose himself to the capital charge of offering violence to his superior officer in the execution of his office. There is this difference between plain clothes and regimentals; there would be no occasion to establish by proof that the soldier had a knowledge of his officer, the officer being in regimentals; it would be presumed, until the contrary was shown: whereas, were the officer in plain clothes, it would

be indispensably necessary to show that the soldier, at the time he offered the violence, was aware that it was directed against his superior officer. (1) Art. 37.

176. The latter part of this article was added in 1846; and it may be remarked that it defines the only offence, committed within the prison, for which soldiers confined in military prisons are liable to be brought to trial by court martial. (2) The violence which the article provides against, must be directed against a visitor or *other* military officer: other acts of violence are otherwise dealt with, and are not cognizable by military law, as the whole of the officers of the prisons, when practicable, are purposely taken from the retired and pension list, and considered as on a civil establishment. (3)

Violence against visitor or military superior by prisoner in a military prison.

The article does not apply when the superior is not himself subject to military law.

177. This offence may also be dealt with in a more summary way by a board of visitors, who have power to enquire upon oath in the presence of the prisoner, and may sentence him to twenty-eight days' close confinement, on bread and water for seven days, and to be divided into periods of seven days in a dark cell, and seven days in a light cell, alternately; and in addition to corporal punishment not exceeding fifty lashes. (4)

Concurrent jurisdiction of board of visitors.

178. *A.W.* 38, § 169.—Some additional remarks as to the limitation of the terms of this article, with reference to the lawfulness of the command, will be offered under the head of a defence which pleads, or is grounded on, inevitable necessity; [§ 595] but the consequence which was attached to the absence of any such qualifying epithet will be seen by a protest which was entered on the journals by some of the lords, who were in the minority when the mutiny bill was read the third time on the 25th March, 1717. (5) After other reasons for being dissentient, they add that (6) "the soldiers are obliged to obey the military orders of their

Disobeying of the lawful command of superior.

The law by imposing a penalty on disobedience

must have assumed that the command

(1) If a guard were at hand and circumstances admitted delay, it might be better, before interfering, to resort to the guard; which would most certainly be the course adopted by an officer in plain clothes, who might see men of another regiment committing a disorder.

(2) *Circ. Mem.*, 23rd Nov. 1849.

(3) Reports of Committee on Military Prisons. War Office, 1st Jan. 1847, pp. 10, 25.

(4) *M.P.R.* 175, 10.

(5) The old mutiny act expired that day, and immediately on its being passed by the Lords, the King came down to the house, and passed it in person.

(6) *Journals*, H. L. xx. 431.

was within the compass of the law,

and this is now expressly specified.

Express refusal to obey, not necessary to the offence,

but there must be intentional disregard of authority.

Desertion distinguished from absence without leave ;

defined to be illegal absence from duty, not only without leave, but also with an intention of not 'ing,

superior officers, under penalty of being sentenced by a court martial to suffer death for his (*sic*) disobedience ; and that without any limitation or restriction, whether such orders are agreeable to the laws of the realm or not ; when, by the fundamental laws thereof, the commands and orders of the crown (the supreme authority) are bound and restrained within the compass of the law, and no person is obliged to obey any such order or command, if it be illegal, and is punishable by law if he does, notwithstanding any such order or command, though from the King." This limitation, which must always have been the implied intention of the law, was expressed by the insertion of the word "lawful" in the mutiny act of 1718, and has obviated any misunderstanding of its true meaning in this respect. But the wording of the mutiny act and the corresponding article as thus altered, "refuse to obey any lawful command," left room for a question whether they extended to disobedience, unaccompanied by an express refusal ; and this again was altered in 1749, to the existing form, "disobey the lawful command." This extends to every act of direct disobedience, whether active or passive, but the capital offence is not complete by mere neglect or forgetfulness. There must be an intentional disobedience or defiance of authority, although not necessarily expressed in words. The offence contemplated by the article appears to be the wilful disobedience of a personal order to do, or not to do, a particular act, or an order addressed to officers or soldiers with reference to an immediate occasion, as distinguished from general regulations or standing orders. "Neglecting to obey garrison or other orders" is an offence of a less aggravated nature, noticed in the seventy-fifth article.

179. *A.W.* 46, § 169.—With respect to desertion, it is very necessary to observe, that an essential and important difference exists between this offence and that of absence without leave. The intention—whether to return, or not to return—is the criterion by which to distinguish between them.

180. Desertion is the absence without leave of an officer or soldier from his regiment or corps, or from the place where his duty requires him to be, *with an intention of not returning*. The illegal absence may arise—for example—

either from his wilful departure without leave from the regiment, detachment, or corps to which he belongs, or may have been attached, *with an intention not to return*;—or from his wilful and continued absence, an *intention of not returning* being evinced, though the departure might have been with leave, as when a soldier deserts on expiration of his pass or furlough;—or attributable, in the first instance, to a cause not under the control of the offender, as when taken prisoner by the enemy's advanced parties, and thus separated from his corps. In every case, the absence of an intention or disposition to return (of the *animus revertendi*, as it is called) is the difference which is essential to, and constitutes, desertion; and this, even though the deserter may have subsequently surrendered himself—which circumstance may indeed weigh in the apportionment of punishment, but cannot countervail against conclusive evidence in support of the charge.

DESERTION.

or an intention of returning having been given up.

The intention to desert is that which alone constitutes the crime.

181. The mutiny act provides that any non-commissioned officer or soldier belonging to any regiment or corps, who shall, without having first obtained his discharge, enlist in any other regiment or corps, may be deemed to have deserted, and be liable to be punished accordingly. (7) The forty-ninth article of war contains corresponding clauses, and also, as amended in 1860, makes a provision in a most practical and intelligible form, that any number of charges of desertion may form the subject of a single arraignment.

Provision as to deserters re-enlisting,

and their trial, when one or more instances are discovered.

182. The evidence to support the charge of desertion must always vary: the intention may be proved by direct or circumstantial evidence; it may be inferred or presumed from the length of absence, the prisoner offering no proof to the contrary. In every case, however, proof must be adduced sufficient to lead the court to the conclusion that the accused either had no intention of returning or rejoining his corps at the time he absented himself, or at the period when the obstacles to his return might have ceased, or else that he had given up such intention. It is impossible to lay

Evidence to support charge of desertion must prove circumstances tending to show that the absence was an abandonment of the service.

(7) M.A.15. A.W. 42. See § 188. The fiftieth section of the mutiny act, as altered in the year 1876, extends this provision to the reserve and auxiliary forces; and renders offenders liable to be tried for desertion. This section also provides an alternative, which the secretary of state for war may adopt in the case of militia-men who confess desertion. See Q.R. § 6, p. 63.

DESERTION.
Time of
absence not
always a
criterion of
desertion.

down any particular time (8) of absence which may constitute a proof of the intention to desert. Illegal absence for a considerable time is *prima facie* evidence of intention not to return; if extending to twenty-one days, in the case of a soldier, it may be proved by the record of the court of enquiry, which [§ 347] is then assembled, and, by an exceptional provision in the articles of war, receives evidence on oath; but it is competent to the party accused in every case to bring in proof acts, or circumstances, implying a contrary intention. On the other hand, sufficient evidence of an intention to desert may be afforded by absence for a very considerable time, or by absence however short, if attended by circumstances evincing an intention permanently to abandon, or withdraw from, the regiment or corps, as stepping into a boat, or taking measures to procure the means of crossing a frontier river; or by enlisting or offering to enlist, when disguised, in another corps; or by embarking for a distant part of the world, or embarking for a neighbouring port; or taking a place in a coach, the offender having no object in view which may tend to account for the dereliction of duty and lead to the belief that a temporary absence only was intended.

Distance not
invariably
conclusive.

183. Neither can desertion invariably be judged by distance; a soldier may absent himself without leave and depart to a very considerable distance, and yet the evidence of an intention to return may be clear; whereas, he may scarcely quit the camp or barrack-yard, and the evidence of desertion may be complete, as if a soldier were detected in passing through the outposts clandestinely; or crossing a frontier;

(8) The forty-third article of war has for many years contained an explicit provision, that soldiers "*tried for desertion*" may nevertheless be found guilty of *absence without leave*. The article, as it used to stand, *had been* too often misconstrued. It *was not intended*, most certainly, to define the period, which should be conclusive proof of desertion, by providing that a regimental court martial should not try a soldier for absence without leave, *if the absence had exceeded twenty-one days*, and by directing, as it did before 1871, that in this case the offender should be *tried for desertion*. The question of the intention of the prisoner to desert or *not*, is clearly a matter

for the determination of the court, judging from the facts before them; and undoubtedly, if they are of opinion that there was *not* an *intention* to desert, they ought then to find the prisoner guilty of being absent without leave, a minor offence necessarily included in the grave charge of desertion.

Justice, no less than sound policy, would seem equally concerned in marking this difference, and whilst *awarding* a sufficient, possibly the *same*, punishment, for the breach of discipline in either case, to reserve the penalties inseparable from a conviction of desertion and the moral stigma attending it, for those cases only where the crime shall be clearly made out.

or taken in disguise, with letters on his person indicating the intention, although he may have gone a few paces only in furtherance of his design. The perpetration of any heinous crime, coupled with absence without leave and the forcible capture of the offender—though the absence be of very short duration, and the distance inconsiderable—may lead to the belief that the prisoner had no intention of returning. The fiftieth article of war, which provides for the punishment of a soldier found more than one mile from the camp, without leave in writing, has no reference whatever to the crime of desertion, except perhaps as it may be intended to obviate facilities for it, though it has been most unaccountably considered a sort of definition of that offence. The article is, however, of very ancient standing, and appears to have been framed chiefly to prevent marauding, by checking inclination to straggle at great distances from camp during the time soldiers may be unemployed, and when they may be lawfully absent.

184. It is scarcely necessary to remark that where the proof amounts only to *absence without leave*, however aggravated, the offender, although charged with desertion, ought not to be exposed to the forfeitures consequent on a conviction of desertion, and must, as specially provided by the forty-third article of war, be found guilty of the minor crime, absence without leave, and receive judgment accordingly.

Prisoner may be acquitted of desertion, and absence without leave may be found where desertion is charged.

185. It must be borne in mind, that, as already mentioned, [§139] a soldier found guilty of desertion, such finding having been confirmed, thereupon forfeits any medals or decorations and all advantages which might have otherwise accrued from the length of his *former* service, in addition to any punishment the court may award; (1) and moreover forfeits his regular pay for the day or days during which he may have been absent, which last forfeiture is alone incurred upon conviction of absence without leave. (2)

Forfeiture of former service inseparable from conviction of desertion

186. These forfeitures are consequent on, and inseparable from, conviction. The moment the sentence is complete by the confirmation of the superior authority, the soldier incurs the penalty, and it is not in the discretion of an officer

Forfeitures contrasted with those for absence without leave,

(1) A.W.168. The court *may* award from future service. A.W.117.
the forfeiture of advantages arising (2) A.W.172, R.W.684.

These forfeitures are consequent on conviction without any act of the court.

Convicted deserters may be compulsorily transferred, without their own consent.

Sentenced to make good bounty fraudulently obtained.

Soldiers illegally absent for more than twenty-one days cannot be tried by a regimental court martial; nor, if

confirming the sentence to remit it. Although the forfeitures spring from the finding, yet they do not, in any circumstances, depend in any degree on the sentence. It would therefore be, not only an act of supererogation in a court martial to notice these forfeitures in its sentence, but an impotent and intrusive assumption of jurisdiction.

187. In connection with the forfeitures consequent on conviction of desertion, it may be mentioned that by an addition to the fifty-fourth section of the mutiny act in 1867, it was provided that, "upon the conviction by court martial of any soldier of the crime of desertion, the officer commanding-in-chief Her Majesty's forces may, and if the court martial has been held at a foreign station the officer commanding-in-chief Her Majesty's forces at such foreign station may, order such soldier to serve in any regiment or corps." (3)

188. In cases of fraudulent re-enlistment the court may sentence the deserter to be put under stoppages of pay until he shall have made good any bounty or free kit fraudulently obtained by him by desertion from his corps and enlisting in some other corps or the militia. (4)

189. Desertion, however short the period of absence, is not in any circumstances cognizable by a regimental court martial. Absence without leave, when the absence (if [§191] wilful) has exceeded twenty-one days, (5) cannot be tried by a regimental court martial without the permission

(3) A.W.42. See §181n, 193n.

(4) A.W.130. The Queen's Regulations of 1859 (p. 225) directed that in cases of fraudulent re-enlistment, the amount of bounty and of the free kit a soldier may obtain thereby was to be specified in the charge. It is so specified in the forms of charges. Q.R. App. C., 10.

(5) In those cases where the soldier may have been committed by a magistrate on a charge of desertion, this period must be calculated up to the day on which he surrendered himself or was apprehended. It rarely happens that personal evidence of that date can be given before a court martial, but the 34th section of the mutiny act, as amended in 1863, provides documentary evidence.

The principle, so advantageously admitted in making the record of the

court of enquiry, as to the illegal absence of a soldier, evidence upon his trial for desertion (A.W.167, §347) was then extended to meet the requirements of this case also; and the description return, which the justice is required to transmit to the secretary of state for war (but not a copy duly authenticated) was declared sufficient evidence, in the absence of proof to the contrary, of the fact of the apprehension or voluntary surrender, of the date of committal, and as to whether the person committed as a deserter admitted or denied that he belonged to the service.

Now that this alteration has been introduced, it becomes doubly "important for the interest of the" prisoner that the form of return of persons committed on a charge of desertion in the schedule of the mutiny act, should

of the officer commanding the brigade district or garrison; but must be tried by a general or district court martial. (6) General officers alone can dispense with a court martial when the absence has exceeded five days. (7)

absent above five, be disposed of by the commanding officer without permission,

190. It has been laid down, on the highest authority, (8) that "the period of detention in prison" [when committed on a charge of desertion] "cannot be reckoned as a portion of the time he has been *wilfully* and (consequently) illegally absent from his duty." It was pointed out at the same time that the duration of the illegal absence should clearly appear on the face of the charge.

the absence being wilful.

191. When the circumstances do not indicate an intention to desert, a soldier can only be tried for the minor offence of absence without leave, even though a court of enquiry may have recorded his absence for twenty-one days.

Desertion or absence without leave charged according to facts, without reference to time.

192. The forty-seventh article of war empowers the commander in chief, at home or abroad, to dispense, in *any* case, with the trial of a soldier confessing desertion, the soldier "thereupon" becoming subject to the forfeitures consequent on a *conviction* of desertion. (9) Before 1841, the trial was *imperative*, after a regimental board [§347] had been held to record the illegal absence.

Trial of soldier for desertion may be dispensed with in any case by commander in chief.

193. A recruit also having been attested or received pay other than enlisting money, (10) and deserting before joining his regiment or corps, on being apprehended, and committed for such desertion by any justice of the peace upon the testimony of one or more witnesses upon oath, or upon his own

Recruits deserting before joining their regiments or corps,

be amended so as not to lead to an admission of "*desertion*" by a prisoner guilty of simple "illegal absence," but not alive to the importance of the distinction.—See §957*n*, 993.

(6) A.W.136. Previous to the omission from the articles of war of 1871 of a provision to that effect, absence without leave for twenty-one days was tried as desertion by a superior court unless permission was given for the trial as absence without leave by a regimental court martial.—See §182*n*.

(7) Q.R.S.6*p*.25. "Though the absence may not amount to an entire day of 24 hours, the day on which the soldier absents himself and the day on which he returns are equally to be

reckoned as days for this purpose."—*Note, ib.*

(8) Letter, Adjutant General, Horse Guards, 10th March, 1840.

(9) Until the article was altered in 1866, the commander in chief was enabled to dispense with the trial of any soldier for desertion, if there were "special circumstances to justify such dispensation," without any such consequent forfeitures.—As to militiamen, &c. enlisting in the regular forces, see §181(7).

(10) Recruits, absconding before they have been attested, or received pay, are not triable by court martial [§66]; but are punishable as rogues and vagabonds.—M.A.47.

may be transferred.

But liable to no other punishment, except forfeiture of bounty.

Corresponding with, relieving, or protecting enemy.

Misbehaving before the enemy.

Misbehaving before the enemy, not synonymous with cowardice.

confession, forfeits his personal bounty, and is liable to be transferred to any regiment or corps or depot nearest to the place where he shall have been apprehended, or to any other regiment or corps to which Her Majesty may deem it more desirable that he should be transferred. (11) Deserters thus transferred are not "liable to other punishment for the offence, or to any other penalty except the forfeiture of their personal bounty." (1)

194. *A.W.* 51, § 169.—The military offence, defined in this article, amounts to an overt act of treason. The words in the latter part of this article, *relieving with money, victuals or ammunition, or knowingly harbouring or protecting an enemy*, are not expressed in the mutiny act, but no better proof could be required of *holding correspondence with an enemy*,—the offence which is specified in the mutiny act,—than relieving him by money, victuals, or ammunition, or by harbouring or protecting him. The distinction is, however, made in the article of war, and is, therefore, to be noticed here; and also that *rebels* are included in *enemy*, as used in the article, where the mutiny act is worded "any rebel or enemy of Her Majesty."

195. *A.W.* 52, § 169.—This article combines two of the old articles of war; the first paragraph, as it now stands, relates to personal misbehaviour, and the shameful abandoning or delivering up any garrison, fortress, post or guard; the second, to compelling or inducing others to misbehave. Misbehaviour before the enemy is generally deemed synonymous with cowardice; but that there is an essential difference, appears from the approved sentence of the court martial on Captain Barnes, 2nd battalion, 89th regiment;

(11) The Queen's Regulations (*S.* 19, p. 8) point out that the recruit "may be ordered to serve without attestation." The receipt of pay is legally sufficient. § 65n.

(1) *M.A.* 36. "Punishment" as here used refers to compulsory transfer, and in many cases it is no doubt felt as a very serious punishment. The fact that it is so regarded by the legislature makes a provision which was added to the 34th section of the mutiny act in 1863 all the more peculiar. It provides that, on committal "as a deserter"—not on conviction of the crime of desertion as elsewhere provided [§ 187]—the general or officer

commanding may order the person so committed to be transferred, providing, moreover, that he "shall also be liable after such transfer of service to be *tried* and *punished* as a deserter." This might have been supposed to have been a mere mistake, except that the clause has remained unaltered for so many years,—the only case where the law has made provision for an unconvicted prisoner being punished first and tried afterwards, and then again punished, if found guilty of the offence for which he was in the first instance committed in order to being "proceeded against according to law."

he was charged "with misbehaving himself before the enemy, in the expedition under the command of Major General Lord Blaney, in the month of October, 1810," upon which charge the court "was of opinion, that the prisoner was so far guilty of misbehaving before the enemy, inasmuch as he was not with his company at the moment of the general retreat; but in consequence of the good conduct of the prisoner, previous to the retreat, the court did not find him guilty of personal cowardice. The court, therefore, sentenced him to be *cashiered*, but at the same time humbly presumed to recommend him as an object of clemency to His Royal Highness the Prince Regent." (2) That the slightest shadow of cowardice could not attach to the absence of Captain Barnes, highly culpable as it appears, from the sentence, to have been, is evident from the recommendations of the court, the mitigation (3) by the Prince Regent of the sentence awarded him, and his subsequent restoration to his rank in the 44th regiment.

196. Next as to the term "shamefully abandon."—The broad and general maxim is, and ever has been, that a post must be defended to the last extremity, and that so long as any expedient remains unattempted, or any rational hope of defence exists, it is criminal to abandon or deliver it up; and that to surrender a post, when not justified by necessity, is shamefully to abandon or deliver it up. But what is the last extremity? When does that inevitable necessity arise which amounts to a justification? There are no orders in the British service, not obsolete, which can be referred to in replying to these questions. The abandonment of a post in the field can only be judged by the particular attendant circumstances; but with respect to places of strength, there are fixed principles which may guide the judgment. They are very distinctly traceable in "the laws and ordinances of war" for the parliamentary army, which Mr. Samuel considers, and this must be admitted, admirably calculated, so far as they go, to elucidate the subject. The article, as first put forth in 1642, was verbatim the same with the corresponding

Art. 52.

Shamefully
abandoning
a post;

(2) G.O.213.

(3) See § 116.—It may be remarked, as to this sentence, which was approved by the Prince Regent, that a recommendation to mercy is included in the sentence, which was awarded in the

discretion of the court; but it must be remembered that His Majesty's pleasure, as to the inexpediency of such proceeding, had not then been made known.

Art. 52.

article established for the King's army by the Earl of Northumberland in 1640: "If any town, castle, or fort be yielded up without the *utmost necessity*, the governor thereof shall be punished with death." This was enlarged in 1643 as follows: "And withal to know in what *case* and circumstances, a governor and the militia of the garrison may be blameless for the surrendering of a town, castle, or fort, it is hereby expressly signified: That, *first*, they are to *prove* the *extremity of want* within the place, inasmuch that no *eatable* provision was left there for sustenance of their lives; *Secondly*, that no succour or relief, in any probable wise, could be hoped for; *Thirdly*, that nothing else could be expected, but that within a short time, the town, castle, or fort, with all the garrison, and arms, ammunition, magazines and appurtenances in it, must of *necessity* fall into the hands of the enemy. Upon proof of which forementioned circumstances, they may be *acquitted* in a council of war, else to be liable to the punishment above expressed."

whether
previous
consultation
is necessary.

197. Mr. Samuel⁽⁴⁾ quotes an "observation of a writer of great military experience,"⁽⁵⁾ and suggests that the surrender of a place cannot be justified, without "a previous consultation among the principal officers, as to the possibility of the further maintenance of the place." It rather accords with military ideas in the present day, that an officer in command should act independent of others; but his conduct, to be justified, must necessarily be supported by the opinions of the principal officers present. It is inseparable from an active and energetic defence, that a governor should be in constant and unrestricted communication with the superior officers of the garrison, the commanding artillery and engineer officers and other heads of departments; a formal consultation, therefore, in desperate cases, can be expected to add little to the system of defence, and in fact has seldom

(4) Law Military (1816), p. 606.

(5) This was Matthew Sutcliffe, LL.D., and the work quoted is "*The Practice and Lawes of Armes*" (1593). Mr. Samuel elsewhere (p. 553) quotes from this work, and speaks of the author as "the learned civilian and judge advocate," but at the time he published it he had been for some years dean of Exeter, and before that archdeacon of Taunton.

Nicholas Upton also, who had seen several campaigns in France and elsewhere in early life, ended by being a member of a cathedral chapter, having been canon and precentor of Salisbury towards the middle of the fifteenth century, when he wrote his book "*Destudio militari*,"—the first book on this subject by an Englishman, as Dean Sutcliffe's was the first book in English.

been resorted to, but (as is usually the object of councils of war) to furnish an excuse for the execution of a predetermined plan of an unfortunate and unpopular tendency. In the French service, a governor besieged is authorized to form a *conseil de défense* (6) composed of the heads of departments; and this measure, if resorted to at the commencement or during the progress of the siege, and not to justify capitulation, seems preferable to, or perhaps less objectionable than, any other form of a council of war; particularly if, as in the *conseil de défense*, the opinion of each individual, on any proposed question, be *separately* and minutely recorded. The great objection to a *council of war*, which increases with the number of which it may be composed, is, that the individuals may be led to shelter themselves, under the aggregate opinion, for any concurrence in an unfavourable measure which they may express, knowing that the chief honour, as well as the principal responsibility attending the result of a desperate or critical measure, must attach to the authority convoking the council.

Art. 52.

Abandoning
a post.

198. The ordinances of Lewis the Fourteenth have been adopted by all the governments of the many forms which have subsequently wielded the power of France, and distinctly declare the necessity which can alone reconcile the surrender of a place with honour: "Tout commandant de place forte ou bastionnée, qui la rendra à l'ennemi avant qu'il y ait brèche accessible, et praticable au corps de la dite place, et avant que le corps de place ait soutenu au moins un assaut, si toutefois il y a un retranchement intérieur derrière la brèche, sera puni de mort, à moins qu'il ne manque de munitions ou de vivres." (7)

Rule in the
French service.

199. As to the use of the word *post*, as it occurs in this and other articles, it may be observed, that, in this place, it

Meaning of
word "post."

(6) Décret impérial, 24 décembre, 1811.

(7) The following extract from a very valuable work, by Colonel (afterwards Lt. Gen. Sir) J. T. Jones, R.E., printed for private circulation, as to the lines thrown up to cover Lisbon in 1810, shows the very happy adoption of a council of defence, which perhaps derived its value and importance from the special provision made for its guidance: "The garrison of Abrantes was composed altogether of troops in the service

of Portugal, commanded by a Portuguese governor. The only British in the place were the engineers, the senior of whom, Captain Patton (the officer who had constructed the defences), being a man of peculiar gallantry and firmness, was, by order of Lord Wellington, made one of a council of defence, and any proposition for surrender was forbidden to be tendered or received without his name being signed in approval of the measure."

has reference to some point or position, whether fortified or not, which a detachment may be ordered to occupy, or which it may be its duty to defend; in the fifty-third article it has an indefinite signification, but with a general reference to the position or place which it may be the duty of an officer or soldier to be in, more especially when under arms; in the fifty-seventh article, the re-insertion of "sentinel," has rendered it still more clear than before that *post* applies to the spot on which a sentry stands when, on coming on duty, he receives his orders; or on which he is placed, when the officer, or non-commissioned officer posting him, leaves him to the observance of his duties; in this sense, it is used in the general orders of the army, when it is said, that "sentinels are not to walk more than ten yards on each side of their posts." The word *post* may also apply to the whole extent of ground specially pointed out as the limits of the walk of a sentry.

III.
Death and penal
servitude,
specified in
articles, but not
now applicable.

200. The punishments of death and penal servitude are annexed to the following articles; but as the offences therein declared are not expressly made liable to such punishments by the mutiny act, [§ 38] they were not applicable within the United Kingdom, or within the British Isles, before 1866; and they are no longer applicable elsewhere, as Her Majesty, in the articles of that and subsequent years, [§ 39] was pleased to restrain the action of her royal prerogative beyond the seas, [§ 2] and to direct that no one subject to the mutiny act should by virtue of the articles of war be sentenced to suffer any punishment extending to life or limb, or to suffer penal servitude "except for such crimes as are expressly declared by the mutiny act to be so punishable." (8) Practically, therefore, the following offences come under the head of "crimes not capital;" but the articles of war still continuing to make the distinction, (9) they are here arranged separately.

A.W. 53. Leaving commanding officer, or post, [§ 190] to go in search of plunder:

(8) A.W. 189.

(9) In the old articles of war (until 1829) death was annexed, without distinction of place, to the present 53rd

article; to the 54th, 55th, and 56th articles beyond the seas; and the offences declared in the 58th article were, as now, limited to foreign parts.

- A.W. 54. Treacherously making known the watchword : Art. 52.
 55. Intentionally occasioning false alarms in action, camp, garrison, or quarters : [§ 201]
 56. Casting away arms or ammunition in presence of an enemy :
 58. *Employed in foreign parts*, [§ 202] and doing violence to any person bringing provisions or other necessities to the quarters of the army: [§ 203]
 Forcing a safeguard ; [§ 204]
 Breaking into a house or cellar for plunder.

201. A.W. 55, § 200.—This article is similar to the seventy-first article, which applies only to the United Kingdom and British Isles, except that false alarms *in action* are now provided for by it, as well as false alarms in camp, garrison, or quarters. The word *intentionally* was introduced into the fifty-fifth article in 1830, the effect of which may be to throw the proof of intention on the prosecutor ; whereas, before the insertion of this word—as still under the seventy-first article—it might have been sufficient to prove the fact, and connect the accused with the effect as charged, leaving him to exonerate himself from culpable intention, if possible. Intentionally occasioning false alarms.

202. A.W. 58, § 200.—The terms of this article limit its operation to the offences of officers or soldiers “employed in foreign parts.”—It is obvious that in those circumstances there would then be greater occasion to repress a tendency to violence on the part of the troops, than when employed among their own countrymen. Violence to bring of provisions.
In foreign parts only.

203. A question has been raised as to the precise meaning of the words in this article—“shall *do violence* to any person bringing provisions or other necessities to the quarters of our forces.” Mr. Samuel enters upon a long discussion on the words, “*shall do violence to any person*,” and enumerates, as embraced by them, a vast number of offences, which in the eye of the law amount to *personal* violence, from homicide to forcible extortion from the person. Others extend their operation to all possible acts of violence, whether as affecting the *person* or the *property* of the bringer of provisions. It is probable that the words, “shall do violence,” apply to any act which, at common law, would amount to robbery from the person, or to any assault with Nature of violence.

Art. 52.

intent to rob or to commit felony. In the conflict of opinions, it is very happy that a court martial is *now* empowered to apportion punishment to the degree of guilt of which an offender may be convicted. Before the revision of the articles of war in 1829, the punishment of death was peremptorily enjoined, without any discretionary power in the court.

Forcing a safeguard.

Or "protection" given by the general, and formerly by the crown.

Order of the Duke of Wellington.

204. The phrase, "shall force a safeguard," also in the fifty-eighth article, has sometimes been unaccountably misunderstood; the word *safeguard* has been erroneously supposed to be synonymous with *sentinel*. It never can be imagined that an offence, which up to the publication of the articles of war of 1829 was punishable, without alternative, by death, could be perpetrated by forcing an ordinary sentry, a crime of a very grave character, but, in its nature, widely different from this offence, which, besides being a contemptuous violation of supreme authority, may bring in question the good faith of a general in chief. By the laws of nations, a *safeconduct* or *safeguard* has ever been respected, and the violation resented with the keenest jealousy, more so even than the infraction of a flag of truce. Quotations may be multiplied, both from the orders of British and foreign generals, to illustrate the view now taken of the term *safeguard*; but an order of the Duke of Wellington, dated, Pombreira, 18th March, 1811, will suffice to prove that, in the present day, *safeguard* has a meaning distinct and different from that of sentinel or ordinary guard, though perhaps in his Grace's order it is used in a more extended sense than had generally been applied to it previously: "The commander of the forces requests the general officers commanding divisions will place safeguards in the villages in the neighbourhood of their encampments, to prevent the soldiers from carrying off the furniture, poles of the vines, and other property of the inhabitants. The commander of the forces desires that, at the same time with this order, the articles of war, regarding forcing safeguards, may be read to the troops."

IV.
Offences punishable by penal servitude.

205. The only offences for which penal servitude can be awarded, except for capital crimes, are those declared in the following article:—

A.W. 80. Any officer or soldier, or other person employed in the war department, or in any way concerned in the care or distribution of any money, provisions, forage, arms, ammunition, clothing, or other stores belonging to the army, or for Her Majesty's use—embezzling, fraudulently misapplying, wilfully damaging, stealing—or receiving the same, knowing them to have been stolen—or being concerned therein, or conniving thereat.

Embezzlement,

The court martial commission (1868-9) has recommended that, whenever it is practicable, cases of embezzlement of more than common importance should be submitted to an ordinary criminal court, as having more experience in dealing with such charges, and greater facility for thoroughly investigating them. (1) The sentence of a general court martial on a conviction under this article, is restricted to the provisions of the seventeenth section of the mutiny act, which authorizes a sentence of penal servitude for any term not less than five years, or of fine, imprisonment, with or without hard labour, dismissal from Her Majesty's service, reduction to the ranks if a warrant (2) or non-commissioned officer. The act also directs that every such offender shall, in addition to any other punishment, make good at his own expense the loss and damage sustained,—and in every case the court is required to ascertain by evidence the amount of such loss or damage, and to declare by their sentence that such amount shall be made good by the offender. The loss and damage so ascertained becomes a debt to Her Majesty, and may be recovered in any of the courts at Westminster or in Dublin, or the court of exchequer in Scotland, or in any court in the colonies, or in India, where the person sentenced by the court martial shall be resident, after the said judgment shall be confirmed and made known; or the offender, if he shall remain in the service, may be put under stoppages not exceeding one-half of his pay and allowances until the amount so ascertained shall be recovered.

when involving examination into accounts of a complicated nature, may preferably be tried in the ordinary criminal courts.

Punishment by court martial under the mutiny act.

Amount embezzled to be ascertained by court martial, and may be recovered in civil court;

or by stoppages.

206. It is not competent to a court martial to award imprisonment till such amount be paid. (3) Its duty is to ascertain the loss or damage, and to declare that the offender

Imprisonment to be for a fixed time; fine imposed as punishment, not to cover amount embezzled.

(1) Second Report (May 14, 1869), war, § 130. page vii.

(3) G.O.299. Sentence of court martial on Paymaster W. Maxwell, Leeds

(2) See the limitation as to warrant officers provided by the articles of Recruiting District.

shall make good the amount. Any imprisonment awarded by the court must be for a definite period; and any fine imposed must be with a view to punishment, and altogether apart from the amount embezzled.

Soldiers punishable by district or garrison court martial.

207. The article renders a soldier liable to be tried by a district or garrison court martial for the offences declared by it, without any exception. (1)

Officers in certain cases necessarily cashiered.

208. It must also be observed that in cases which fall under the eighty-eighth article, as already observed under that article, [§162-3], the court is peremptorily required to sentence officers to be cashiered.

Soldiers triable by general court martial for disgraceful conduct.

209. Soldiers are liable to be arraigned before a general court martial under the eighty-eighth article, for being concerned in or conniving at embezzlement of stores by any false document.

Purloining government property or stores, punishable on a charge of disgraceful conduct.

210. Soldiers, although not concerned in the care or distribution of government money or property, which is essential to the offences contemplated by the eightieth article, who may steal or embezzle them, or receive them knowing them to have been stolen or embezzled, are made liable, by the restoration of an old provision to the article of war in the year 1862, (2) to be tried by a general, district, or garrison court martial on a charge of disgraceful conduct.

V.
Fines for drunkenness.

Fines for drunkenness on or off duty have superseded forfeitures for habitual drunkenness.

211. Punishments for habitual drunkenness were introduced into the articles of war for 1830, rendering an offender liable to forfeiture of one penny a day of his daily pay, on convictions of four acts of drunkenness within the year, or of being twice drunk on or for duty, or on parade or on the line of march, but so that he should not be placed under forfeitures exceeding "three pence *per diem*." These forfeitures were abolished in 1869, and the articles of war now empower any court martial, if they think fit, to award a fine for drunkenness—

to which the offender is liable at the discretion of the court.

A.W.77. "If any soldier shall be drunk, whether on duty or not on duty, he shall, on conviction thereof before any court martial, in addition to or without any such other punishment as the

(1) "Pay-sergeants are not to be subjected to the risk of loss by having large sums of public money placed in their hands. Officers commanding troops and companies receive an allowance, which, amongst other things, is

intended to compensate for this risk, and are bound to take charge of all public money received from paymasters, or others, on account of their troops or companies."—Q.R.S.7, p.66.

(2) A.W.81 (vii.), § 223.

court may award, be liable to a fine not exceeding one pound, to be levied by stoppages from the offender's daily pay." (3)

212. In levying any fine or fines for drunkenness, whether imposed by a court martial or a commanding officer, (4) the stoppages from the offender's daily pay must in no case exceed fourpence a day. (5)

The stoppages in respect to them not to exceed fourpence a day.

213. A regimental or detachment court martial may try any non-commissioned officer on a charge of drunkenness not on duty, but shall not try any other soldier on such charge. (6) If any soldier shall be drunk when not on duty, and it shall appear expedient to the commanding officer that such soldier, by reason of previous offences of drunkenness, should be brought before a district or garrison court martial, he shall make application to the general officer commanding the district or station, who shall, if he shall so think fit, make order for the trial of such soldier. (7) The question was raised with reference to the distinctive punishments for habitual drunkenness on or off duty; and it may still be asked: Is a soldier on duty when on fatigue? There can be little hazard in replying that a soldier on fatigue is decidedly on duty, and it may be very important duty too—the employment of artillerymen in magazines for instance. (8)

Distinctive jurisdiction of courts martial in cases of drunkenness.

Question as to charge of "drunk on duty."

214. In every case where a soldier is found guilty by a court martial of drunkenness, whether on duty or not on duty, the court must, for the purpose of assisting their dis-

Entries of drunkenness to be given in evidence whenever prisoner is found guilty of drunkenness.

(3) The article also provides, that "If any soldier shall be drunk, whether on duty or not on duty, his commanding officer may, with or without any other lawful punishment, award him to pay a fine not exceeding ten shillings, such fine to be levied by stoppages from the offender's daily pay. Any soldier who shall object to such award on the ground of his innocence of the offence [§ 367] shall, if he so request, have a right to be tried by a district or garrison court martial instead of submitting to such fine."

(4) A scale of fines is laid down, Q.R.S.6.p.15. The amount accruing from the fines form a general fund, applicable, under the direction of the secretary of state for the benefit of the soldiers of the army.

(5) A.W.77. The fines and the maximum daily stoppage in colonial

corps, are one-half the amount above specified.

(6) A.W.77. When drunkenness is combined with an offence, which it is intended to try by a regimental court martial, it must not be added to the charge, but must be dealt with summarily before the man is brought to trial.—Q.R.S.6.p.18,59.

(7) A.W.78.

(8) It may be added that to bring a soldier drunk on fatigue fairly within reach of a charge of drunk on duty, he should have been previously warned for fatigue, or have been taken regularly in his turn or from parade, or have become drunk when on the duty. It would be scarcely right to take a man from his quarters and then try him for drunkenness on duty on detecting the effects of liquor which he had obtained before he was called on for fatigue.

cretion in awarding punishment, receive evidence of all former entries of drunkenness against the prisoner in the regimental company, battery, or other defaulter book. (9)

VI.
Other crimes
not capital,
discretionary as
to nature and
amount of
punishment.

215. Other crimes not capital, which,—except those specified above [§ 142] as being punished peremptorily on conviction in the case of commissioned officers,—are punishable otherwise than by penal servitude, at the discretion of courts martial,⁽¹⁰⁾ both as to the nature and amount of punishment, are the following:—

M.A. 38. Soldier—False representations to procure extension of furlough:

48. Recruit—Wilful false answer at attestation: § 32, 261, 1014.

A.W. 13. Soldier—Vexations and groundless appeal: § 343, 344

14. Breaches of good order:

16. Officer—Provoking speeches or gestures: § 227

19. Refusing to receive or keep prisoner: § 360

31. Not attending divine service:

Behaving irreverently or indecently thereat:

Offering violence to chaplain, &c.:

32. Soldier—Absence from garrison or regimental school:(1)

33. Chaplain—Absence from duty:

35. Soldier—Perjury: § 142, 146

39. Soldier—Traitorous or disrespectful words against the Queen or the royal family: § 142

40. Soldier—Disobeying orders in case of fray: § 147

41. Disrespect to commander in chief:

Violence or insubordinate or threatening language to any superior officer: § 215*, 172–175

44. Soldier—Persuading to desert; concealing desertion: § 142, 257

46. Soldier—False confession of desertion: § 216

50. Soldier—Absence without leave: § 189

Found one mile from camp without pass: § 183

59. Soldier—Sending flag of truce: § 142

60. Soldier—Giving different parole or watchword: § 142

61. Soldier—Spreading alarming reports: § 148

62. Soldier—Words tending to create alarm or despondency in or before action: § 148–150

63. Soldier—Disclosures injuring service: § 148–150

64. Soldier—Quitting ranks in action: § 153

(9) A.W. 78. G.O. (1872) 28. § 1334. and as to the discretionary punishments, see § 113–132.

(10) As to the distinctive jurisdiction of the courts martial, see § 250–269; (1) See § 1369n (Warden v. Bailey).

- A.W. 65. Soldier—Leaving guard or post : § 199
 Becoming prisoner by neglect, &c. :
66. Soldier—Seizing supplies : § 154
68. Soldier—Impeding or not assisting provost marshal, or other officer exercising authority : § 156
69. Soldier—Escaping from confinement : § 142
70. Absence from parade ;
Without urgent necessity quitting platoon or division :
71. In united kingdom—False alarms : § 148, 201
72. Not reporting prisoner :
73. In command of guard, picquet, or patrol—Release without authority : Allowing escape of prisoner : § 355
74. Officer—Unnecessary detention of prisoner : § 352
75. Neglect to obey garrison or other orders : § 178
81. Soldier—Guilty of disgraceful conduct [§ 217] in
- (I) *Malingering : wilfully doing any act, or wilfully disobeying any orders, thereby producing or aggravating disease, or delaying cure :*
- (II) *Wilfully maiming or mutilating himself or another soldier, with intent [§ 220] to render himself [§ 219] or such other soldier [§ 221] unfit for the service : § 139*
- (III) *Tampering with eyes, with intent [§ 220] to render himself unfit for the service : § 139*
- (IV) *Stealing money or goods the property of a comrade, officer, mess, or band ; or knowingly receiving the same when stolen : § 222, 223*
- (V) *Stealing or embezzling government property or stores, or receiving them knowing them to have been stolen : § 210, 223*
- (VI) *Committing any offence of a felonious or fraudulent nature : § 224*
- (VII) *Any other disgraceful conduct, being of a cruel, indecent, or unnatural kind : § 225*
87. Soldier—Making or being privy to any false entry, alteration or erasure, whereby the real services, &c., of, or sentence of courts martial upon, any person shall not be truly given, &c. : § 142
88. Soldier—*Intentionally making false returns, &c. ; by false document conniving at embezzlement ; by producing false vouchers, or in any other way misapplying public money : § 162–163*
89. Soldier—By concealment or wilful omission attempting to evade the true spirit and meaning of, or orders and regulations relating to, the foregoing points : § 164

Other crimes not capital, discretionary as to nature and amount of punishment.

Disgraceful conduct.

False returns.

Other crimes
not capital,
discretionary as
to nature and
amount of
punishment.

Billets and
carriages.

Recruiting.

Miscellaneous.

- A.W. 90. Officer—Signing returns in blank.
 91. Soldier—Offences as to billeting : § 142
 92. Ill-treatment of landlords : § 367
 Commanding officer—Not causing reparation to be made:
 93. Commanding officer—Not clearing billets :
 94. Overloading carriages ; ill-treating waggoners ; refusing
 certificates for carriages :
 95. Offences as to enlisting or attesting recruits :
 96. Soldier—Refusing to assist civil magistrate : § 165–167
 97. Soldier—Improperly protecting from creditors, &c. : § 168
 98. Fighting or not preventing a duel : § 226
 99. Officer—Within reasonable time not submitting his
 character as an officer and gentleman to investigation
 if publicly impugned : § 228
 100. Officer, or non-commissioned officer—Striking a soldier:
 101. Soldier—Hiring for duty ;
 Officer, or non-commissioned officer—Conniving thereat :
 102. Soldier—Pawning, selling, losing, making away with,
 spoiling arms, accoutrements, necessaries ; spoiling,
 making away with, pawning medal ; selling, losing,
 ill-treating horse : § 229
 103. Malicious or unauthorized destruction of property :
 105. Crimes not capital, to the prejudice of good order and
 military discipline, though not specified :
 136. Soldier—Absence without leave less than twenty-
 one days.
 161. Contempts of courts martial : § 434–5
 171. Soldier—Misconduct as prisoner of war.

Insubordination
to superior, too
serious a crime
to be dealt with
without refer-
ence to superior
authority.

Insubordinate
language not so,
but in respect of
superior, triable
as "offence to
the prejudice of
good order and
military
discipline."

False confession
of desertion

an expedient
of discontented
soldiers,

215*. A.W. 41, § 215—The offences in this article were withdrawn from the cognizance of a regimental court martial in 1874. The violence differs from the capital offence [§ 172] in this, that the superior officer need not be proved to be in the execution of his office. Threatening or insubordinate language used in respect to a superior, other than the commander in chief, in his absence, or out of his hearing, does not constitute the offence contemplated by it, and falls under the hundred and fifth article. (2)

216. A.W. 46, § 215—The forty-sixth article is well calculated to frustrate any attempt at false confession of desertion on the part of men who might be desirous of being sent home, even as prisoners, from a bad quarter, or of escaping from any distasteful duty. It provides that

if a soldier (3) while serving in any regiment or corps shall confess to his "commanding officer"—not simply *superior* officer, to guard against "idle talk" being laid hold of—that he is a deserter from some other regiment or corps, or from the militia, and evidence of the truth or falsehood of such confession cannot then be conveniently obtained, a record of such confession, signed by such commanding officer, shall be entered in the regimental books, and such soldier shall continue (4) to do duty in the regiment or corps in which he shall then be serving, or in any other regiment or corps to which he may be transferred, until he shall be discharged, or until legal proof can be obtained of the truth or falsehood of such confession, of the making of which confession the said record, or a copy thereof purporting to bear the signature of the officer having the custody of the regimental books, shall be sufficient evidence: and in any case where such confession shall then appear to be true, the soldier may be tried for desertion, "either in the corps in which he is serving, or in that to which he originally belonged," (5) and on conviction may be punished accordingly. Where such confession shall appear to be false, such soldier may be arraigned before a district or garrison [§ 261] court martial on a charge for making a false statement to his commanding officer, and punished on conviction, as specially provided by the article, by the forfeitures in respect of pay, pension, annuities, and medals, which, since the powers of this court were enlarged in 1869, may be "*awarded*" [§ 123] in all cases in addition to any other punishment such court may award in respect of the charge on which he is arraigned. The article also provides that a letter written in reply to an inquiry respecting the truth or falsehood of such confession, and signed by or on behalf of the commanding officer of the regiment or corps from which such soldier confesses himself to have deserted, is admissible in evidence against such soldier, and is to be deemed to be legal evidence of the facts

now guarded
against.

The being
ordered to do
duty till evi-
dence is
obtained does
not condone the
offence.

Peculiar proof
made evidence,
as to fact of
confession

and as to its
truth or
falsehood.

Trial may be
dispensed with,

(3) Persons, not being soldiers, making a fraudulent confession of desertion, on proof of their confession being false, before any two justices, are liable to be punished as "rogues and vagabonds."—M.A.37.

(4) This is a further exception to the principle referred to in the regulations (S.6,p.32), that the performing

any duty absolves a prisoner from trial or punishment for the offence which he has committed. The exception holds good even if the man has been confined on the confession of desertion, but released and ordered to do duty for want of available proof.—See § 566.

(5) See Q.R.S.6,p.73.

but not forfeiture of service.

stated therein. The forty-seventh article of war moreover provides that the commander-in-chief, or officer commanding on a foreign station, may order a soldier who confesses himself to be a deserter to continue to serve in the regiment or corps in which he shall be then serving, or in any other regiment or corps; and the article thereupon renders such soldier subject to the forfeitures of service, good conduct pay, and medals, [§ 139] as if he had been convicted of desertion.

Disgraceful conduct no longer subject to special punishments, the powers of courts having been equalised;

217. *A. W.* 81, § 215—"Disgraceful conduct" was for the first time used to designate certain specified offences in 1829; and until 1869 the offences so classed, when tried by district or garrison courts martial, rendered the prisoner liable to peculiar additional punishments, which in the majority of cases were reserved for the award of a general court martial; but in that year identical powers in this respect were granted to general and to district or garrison courts martial. [§ 298] The regulations, however, (6) still require acts of disgraceful conduct to be so charged, and the eighty-second article renders it imperative to try a soldier, reported by a court of inquiry [§ 219] to have maimed or mutilated himself, "on a charge for disgraceful conduct." In the circular letter, accompanying the supplementary articles issued in November 1829, the late Lord Hardinge, then secretary at war, explained that "the penalty of forfeiture of pension for disgraceful conduct was introduced into the mutiny act in consequence of numerous instances having occurred, in which soldiers guilty of *infamous* and *vicious* crimes, and disgracefully discharged for such crimes, were pensioned for life." The regulations clearly point out that "A charge of 'disgraceful conduct' is never to be preferred against a soldier, unless the offence is clearly one of those specified in the articles of war." (7)

but the description to be retained in charges.

Penalty of forfeiture of pension why established.

Offences specified in articles of war, and not designated as disgraceful, cannot be charged as such.

Malingering; wilfully producing or aggravating disease, or delaying cure.

218. *A. W.* 81 (1) § 215—The nature of the offence contemplated in the first clause of the article, as amended in 1849, is placed beyond doubt: the act, whatever it may have been, or the disobedience of orders, must appear, not only to have been *wilful*, but also to have produced or

(6) Q.R. App. C. 24-32.

(7) Q.R. App. A. 4. The Duke of Wellington (*Circ.*, Horse Guards, 19th November, 1849) directed that, unless a case fairly came under one or other

of the legal descriptions in the articles of war, it should not be characterized as such in the charge, "it being evident that the indiscriminate use of the terms tends to weaken its moral effect."

aggravated disease or infirmity, or delayed cure. Merely looking at the letter of the article, as it previously stood, a soldier, although no ill-consequences to his health were either intended or ensued, was subject to be tried for disgraceful conduct in "absenting himself from hospital while under medical treatment," an irregularity which, however necessary to restrain by punishment, neither his comrades nor the officers who might have been called on to sit on his trial, would of themselves have thus characterized. Under the operation of the alteration, here adverted to, a soldier who has *wilfully* produced or aggravated disease or delayed his cure may, as before, be convicted of disgraceful conduct, and, as is only equitable, may also be in every case deprived of all claim to pension, in the event of discharge either by the sentence of the court with ignominy or otherwise for disabilities arising from his own wilful misconduct. On the other hand the offence of simply breaking out of hospital and similar breaches of discipline must be otherwise dealt with, and when tried by court martial could not be subjected to any special penalties, as the law stood [§217] before 1869.

Effect of article as formerly worded,

contrasted with the amended article now in force.

219. *A. W.* 81 (II) §215—With reference to the second clause of this article, so far as it relates to self-mutilation, the eighty-second article, instead of the trial before a court martial which had previously been imperative, now provides that any soldier, whether on or off duty, who shall become maimed or mutilated or injured, except by wounds received in action, shall be forthwith brought before a court of enquiry; which shall report their opinion whether such maiming or mutilating or injuring was occasioned by design, and if the court shall report that the maiming or mutilating or injuring was not occasioned by design, the soldier shall not be liable to be called to account in respect thereof; but if the court shall report their opinion that such maiming or mutilating was occasioned by the designed and wilful act of such soldier, or by any other person at the instigation of such soldier, with intent on the part of such soldier to render himself unfit for the service, and not by accident, in that case the soldier shall be forthwith put upon his trial before a *general, district, or garrison* court martial on a charge for *disgraceful* conduct.

Maim or mutilate.

Court of enquiry assembled of necessity,

and trial by court martial, if its opinion is that the maiming was wilful.

220. It may be observed that the addition of the words

Art. 85.

What intention
is a necessary
ingredient of
this offence ;

cases in which
the absence of
it may be
inferred.

Maiming
another
soldier,
even at the
instance of
such soldier,
with intent,
&c.

Stealing by
a soldier.

Petty
fraudulent
offences
cognizable by
district courts
martial.

Offences
committed
against
civilians,

“with intent (8) to render himself unfit for the service,” has served to bring out more clearly what had always been the spirit and meaning of this article. Its penal provisions never were, and now, still more distinctly, cannot be, taken to apply in any case,—as, for example, of a man intending to desert, and being frostbitten when hiding from the parties sent in pursuit of him,—where although the maiming or mutilation has been occasioned by a designed and wilful (and possibly an unlawful) act, it may be made to appear that it was not with intent on the part of the prisoner to render himself unfit for the service.

221. The maim or injury of another soldier must be *with intent* to render the other soldier unfit for the service. Maiming or injuring another soldier with any other criminal intention, might, according to the circumstances, be tried as disgraceful conduct, under the last clause of the article.

222. A. W. 81 (iv) § 215—Stealing by a soldier from a comrade or military officer, or receiving goods so stolen, is an offence which has constantly been tried before courts martial of every description, as a “crime not capital, to the prejudice of good order and military discipline ;” and any doubt as to the legality of such custom was set at rest by a power to that express effect being introduced into the mutiny act and articles of war of 1829. The section (9) (omitted on the revision of the mutiny act in 1860, but still retained in the corresponding section of the marine mutiny act) which defined the powers of a district or garrison court martial as to forfeiture of service, had been repeatedly amended after its introduction in 1829. At first it declared “stealing from a comrade or from a military officer” within the jurisdiction of such court ; in 1830, “stealing any money or goods the property of a comrade, of a military officer, or of any military or regimental mess ;” and in the mutiny act of 1833, this provision was further extended to the commission of “any *petty* offence of a felonious or fraudulent nature, to the injury of or with intent to injure any person, civil or military.” By the omission of “*petty*” in 1847, and the addition of other words, in order to meet cases arising in practice, and which had not hitherto been provided for, the

(8) As to proof of intention, see hereafter, § 881.

(9) M.A. (1829-1846), sec. 9 ; (1847-1859), sec. 28. M.M.A. (1875), sec. 31.

clause was extended to almost every offence, which, it may be supposed, can be adequately punished by a sentence short of penal servitude. But doubts having arisen as to the proper construction of the twenty-eighth section of the then mutiny act and the *then* eighty-fifth and eighty-sixth articles of war (corresponding to the fifth, sixth, and seventh clauses of the eighty-first article of the present year), "in respect to the legality of trying soldiers by courts martial for 'disgraceful conduct' in stealing or embezzling money or goods the property of civilians, or in receiving the same knowing them to be stolen, or in committing any offence amounting to actual felony; and a case having, by the commander in chief's desire, been submitted to the law officers of the crown," it was made known to the army by a circular memorandum, (10) that "the attorney and solicitor general had recorded a distinct opinion, that soldiers may be lawfully tried and punished by courts martial for such offences."

amounting to felony;

may be lawfully charged as "disgraceful conduct."

223. In cases where a soldier is found in possession of or dealing with property not his own, and can give no satisfactory account of it, and it is uncertain whether he was the actual thief or not, it is irregular to frame a single charge in the disjunctive. This had been previously held at the judge advocate general's office, but was very distinctly pointed out by the judge advocate general in 1867, and the new regulations supply a form of two charges in the alternative, (1) the one for stealing, the other for receiving the property knowing it to have been stolen. Mr. Mowbray pointed out that the court may "then find the prisoner guilty of either charge and acquit him of the other, or may acquit him of both charges according to the preponderance of the (2) evidence." [§ 396, 1202]

Alternative charges in doubtful cases.

but finding must be precise.

224. A. W. 81 (vi) § 215—The sixth clause, "or who shall commit any other offence of a felonious or fraudulent nature," was made even more extensive than before by the omission in the articles of 1862 of the words "*to the injury of, or with intent to injure any person, civil or military;*" and although in this and other cases the corresponding clauses

The concurrent jurisdiction of courts martial is lawful, although the special provision to that effect has been expanded from the mutiny act;

(10) Dated, Horse Guards, 29th the civil power.

November, 1851. The new regulations (S.G.p.51) point out that the crime of theft from a comrade should, as a general rule, be dealt with by court martial in preference to being tried by

(1) Q.R. App. C. 29.

(2) J.A.G., 7th February, 1867. An instruction on this point was added to the regulations of 1873.—Q.R. App. C. 33.

in the mutiny act have been omitted, and the inconvenience, arising in the administration of military law from occasional discrepancies between the statute law and the articles of war, has been thus remedied, it is held that the declaration in the first section of the mutiny act of the general power of the Sovereign to make articles of war, "which shall be judicially taken notice of by all judges and in all courts whatsoever," has rendered the insertion of particular statutory provisions to be supererogatory. It may be added that although it is lawful for a court martial thus to exercise a concurrent jurisdiction with the civil courts in cases of ordinary felony, yet that in all cases the prisoner must be delivered over to the civil magistrate on application [§ 165] being made to that effect.

but the civil
justice is
paramount.

225. A. W. 81 (vii) § 215—The "other disgraceful conduct" mentioned in the seventh and last clause of this article must be "of a cruel, indecent, or unnatural kind." It is very certain that no offence, nor the repetition of offences otherwise distinctly specified in the articles of war, as drunkenness or insubordination, nor any offence not declared by the articles of war to be *disgraceful conduct*, can subject the offender to this disgraceful charge, unless the same be proved to come within the designation, *cruel, indecent, unnatural, felonious, or fraudulent*. [§ 217n]

Ordinary
offences
against dis-
cipline not to
be charged as
disgraceful
conduct.

226. A. W. 98, § 215—This and the other articles relating to duelling were amended in the year 1844 (as explained in the circular (1) transmitting the mutiny act and articles of war of that year), "for the purpose of more effectually discouraging and prohibiting a practice which is a violation of Her Majesty's orders, and a flagrant breach of the laws of the land."

Determination
of the
authorities
to suppress
duelling.

227. The articles of 1844 have indeed become obsolete, as regards their actual wording, but, as their spirit survives in the existing articles, (2) it cannot be out of place to retain the latter portion of Lord Hardinge's letter, in which he so clearly put forth his own sentiments on this subject: "Personal differences between gentlemen living together as brother officers can seldom fail to be honourably and promptly adjusted, in the first instance, by explanations between their mutual friends; the propriety of an early explanation and

Spirit of the
articles on
this subject,

as explained
by the late
Lord Hardinge,

(1) Dated, War Office, 18th April, 1844, *Signed*, H. Hardinge.

(2) A.W. 16, 16, 98, 99.

acknowledgment of error was so forcibly pointed out by field marshal the Duke of Wellington in confirming the sentence of a general court martial in 1810, that I insert the following extract of his grace's sentiments on this point:—"The officers of the army should recollect, that it is not only no degradation, but it is meritorious in him who is in the wrong to acknowledge and atone for his error, and that the momentary humiliation which every man may feel upon making such an acknowledgment is more than atoned for by the subsequent satisfaction which it affords him, and by avoiding a trial and conviction of conduct unbecoming an officer."

and by the sentiments of the Duke of Wellington.

228. *A.W.* 99, § 215—The article requires an officer to submit the case to his commanding officer or other competent military authority, "on pain of suffering such punishment as a general court martial may award." This article replaces the seventeenth article of former years, which, because it prescribed no punishment on a failure to accept its suggestion, was held on a court martial, which attracted much attention at the time, to have failed in its purpose of requiring officers to submit to the commanding officer any difference between them which their friends had failed to adjust.

Punishment of failure to refer case affecting an officer's honour to competent authority.

229. *A.W.* 102, § 215—In cases where there may be a doubt as to whether the prisoner made away with, lost by neglect, or sold the article, the Queen's Regulations direct that separate charges should contain each averment. (3) By an alteration of the hundred and sixty-seventh article [§ 347] in 1873, the record of the court of enquiry as to the absence of the prisoner is admissible in evidence on his trial. It may be observed that the court is not authorized by the hundred and thirtieth article to place a prisoner under stoppages [§ 689] in the case of a medal being lost—and not made away with or pawned—by him. (4)

Offences as to arms, kit, medals, horse, &c.

230–249. There remains an offence, specified in the articles of war since 1866, which is distinguished from all the others by the form in which the punishment is annexed to it:—

VII.
Attempts at suicide.

(3) *Q.R. App. C.* 33. See § 396.

(4) *J.A.G.* 17th Feb. 1874.

A.W. 104. "If any person subject to the mutiny act attempt to commit suicide, he shall be liable to be tried by a court martial;—and, upon conviction, he shall be liable, if an officer, to be cashiered, and, if a soldier, to suffer imprisonment, with or without hard labour."

Punishment
prescribed,
but not im-
perative
upon conviction.

It will be observed that the article—though it restricts the court to the one punishment of cashiering in the case of an officer, and to imprisonment with or without hard labour, (5) to the exclusion of any other punishment, in the case of a soldier—does not peremptorily direct the award in either case. It may also be observed, that if the court forbears to award the punishments to which the prisoner is here made liable, it cannot award any of the additional punishments provided by the hundred and seventeenth article. [§ 123, 125]

(5) The article as framed in 1866 "corporal punishment" was omitted rendered a soldier liable to "imprisonment and corporal punishment." The in 1867, the year before the restriction by the mutiny act in all cases.

CHAPTER V.

DISTINCTIVE JURISDICTION OF COURTS MARTIAL.

250. THE several descriptions of courts martial — varying in their constitution and practice, according to the rank of offenders and the crimes with which they are charged—as specified in the mutiny act and articles of war, are:—General, Detachment general, District or garrison, Regimental, and Detachment; to which the articles of war add District for the trial of warrant officers.

Designation of
courts martial
now existing.

251. Field or drum-head courts martial, so called from being held in the field or at the drum-head, were formerly frequently held in cases supposed to require an immediate example; but since it has been requisite to administer an oath to the members of, and witnesses before, courts martial, other than general, they have gradually fallen into desuetude, and are now very rarely resorted to. The articles of war authorize a disregard of the prescribed hours in cases requiring immediate example, and the new regulation [§ 416] allows “the exigencies of the service” to dispense with the four and twenty hours’ notice of the charge; (1) it is, therefore, perfectly regular, when necessary, to assemble a court martial on the spot, at any hour, and to inflict the sentence forthwith; but the ordinary rules must be adhered to, both in the convention and composition of the court, in the administration of oaths, and in the reducing the proceedings to writing. In the event of mutiny or insubordination, accompanied with personal violence, or other offences, committed on the line of march or on board any ship not in commission, regimental and detachment courts martial are armed with special jurisdiction, [§ 268] extending to the trial of those crimes, but without power to award sentences exceeding those which a regimental court martial is ordinarily competent to award. (2)

Drum-head
courts martial

are for the
most part
obsolete.

(1) A.W.160. Q.R.S.6,p.58.

(2) M.A.11. A.W.135.

Graduated
jurisdiction
of courts
martial;

indicated by
distinctions of
dress.

Minor courts
martial.

Distinctive
jurisdiction,

as to persons,

soldiers

entitled to
their dis-
charge;

warrant
officers,

officers,

as to offences.

252. Courts martial, considered with reference to the powers in regard to sentence upon offenders granted by the mutiny act, are of three descriptions, which are moreover marked to the eye by the dress of officers attending them [§ 490]:—General and detachment general courts martial:—District and garrison courts martial:—and lastly, Regimental and detachment courts martial. The courts martial in these two last divisions are also frequently classed together as minor courts martial.

253. The composition and jurisdiction of courts martial in general has been already enlarged upon. It is now necessary to notice the distinctive jurisdiction, as to persons and offences, of the several descriptions of court.

254. Soldiers, (3) including non-commissioned officers, who have enlisted or re-enlisted since the 20th June, 1867, (4) are liable to be brought before every description of court martial, according to the offence. A provision in the Army Service Act, 1847, is applicable to older soldiers, and enacts, that when the term of service of any non-commissioned officer or soldier expires *after* any offence committed by him, and *before* he has been tried or punished, he cannot be so tried for the same after the expiration of his service, except by a general or district or garrison court martial. (5)

255. Warrant officers *may* be tried by district court martial, when any offence charged against them is not so serious as to require investigation by a general court martial; whilst commissioned officers, including those who have relative or honorary rank, cannot in any circumstances be tried by any minor court martial. (6)

256. Except in the case of *soldiers* tried for disgraceful conduct, general courts martial alone are empowered to try civil offences, and that only under the hundred and first section of the mutiny act, and the hundred and forty-third

(3) "*Soldier*" in the mutiny act and articles of war now comprehends non-commissioned officers, which was not invariably the case in former years. —M.A. 67. A.W.107. § 126.

(4) Army Enlistment Act, 1867, sec. 8.

(5) 10 & 11 Vict. c. 37, s. 7. This limitation, it will be observed, does not extend to the trial of offences committed during the time which may elapse *between* the expiration of the time of service on any foreign station

and the final discharge of the soldiers in England, and the same act elsewhere (sec. 6) provides that soldiers entitled to their discharge shall, during such time, remain subject to all the provisions of the mutiny act as fully as before the expiration of their term of service.

(6) Until the beginning of the seventeenth century, regimental courts martial tried all persons belonging to the regiment, except field officers, in cases not capital.

and the two following articles of war. A further distinction referring to the ordinary jurisdiction of courts martial, as respects offences, independent of the punishments they may entail, is pointed out by the articles of war, which, in declaring offences, direct the description of court by which they shall be tried; some by a general court martial, whether committed at home or abroad, or only if in foreign parts; others by a district or garrison court martial; and the remainder by general, district, garrison, regimental, or other court martial.

257. A general court martial can alone hear an appeal under the thirteenth article of war; and the following offences are moreover expressly declared cognizable by a general court martial, and cannot be tried by any minor court martial, except by permission of the general or superior officer; excepting also mutiny, gross insubordination, or other offence on the line of march, or on board any ship not in commission. The Queen's Regulations direct that "the higher tribunal of a general court martial is not to be resorted to except in aggravated cases for which the more severe punishment of penal servitude or death can be awarded." (7)

Cases reserved to the cognizance of general courts martial;

A.W. 13. Vexatious and groundless appeal: § 343

36. Mutiny; sedition; misprision of mutiny: § 170

37. Violence to superior officer in execution of office: § 172-175

38. Disobedience to lawful command of superior officer: § 178

51. Holding correspondence with, or relieving, enemy: § 194

52. Cowardice; shamefully abandoning post; compelling, or using means to induce, others to do so: § 195

53. Leaving post in search of plunder: § 195

54. Treacherously betraying watchword:

55. Intentionally occasioning false alarms: (8) § 201

56. Casting away arms or ammunition in presence of enemy: in foreign parts.

57. Quitting, or sleeping on, post: § 199

258. To which must be added, if committed in *foreign parts*:

A.W. 58. Violence to bringer of provisions; forcing safeguard;

(7) Q.R. § 6, p. 50.

(8) Giving false alarms at home, is an offence cognizable by any court martial.—Art. 76. where intention need not be charged,

without specification of place;

breaking into house or cellar or store for plunder :
§ 202-204

offences re-
served to the
cognizance
of general or
district court
martial.

259. The offences which in like manner are limited to the cognizance of a general, or district, or garrison court martial, and subject to the same exceptions, are :—

A.W.31. Not attending, or irreverence at, divine worship :

Violence to chaplain or minister :

35. Perjury : § 146

39. Traitorous or disrespectful words against the person of the Sovereign, or any of the royal family :

40. Disobeying orders in case of fray : (1)

41. Disrespect to commander in chief : § 215*.

Violence to superior officer [*not in execution of office*] :

Insubordinate language to superior officer : § 172-175.

42. Desertion : § 180-188

44. Persuading to desert : harbouring deserters :

46. False confession of desertion : § 216

59. Sending unauthorized flag of truce :

60. Giving different parole or watchword without good cause :

61. Spreading reports in field, calculated to create unnecessary alarm : § 148

62. Using words to create alarm in action : § 149

63. Producing injurious effects by improper disclosures :
§ 150

64. Quitting ranks in action without orders : § 153

65. Leaving guard, picquet, or post :

Becoming prisoner by neglect :

66. Seizing supplies proceeding to the army, contrary to orders : § 154

67. Conniving at exaction from sutlers ; or deriving advantage from sale of provisions, &c. : (2) § 155

68. Impeding or refusing to assist provost marshal or other officer in the execution of his duty : § 156

69. Breaking arrest ; escape from confinement or prison :

80. Embezzlement : § 205

81. (I) Malingering ; *wilfully* injuring health or delaying cure : § 218

(II) Self-mutilation : § 219

Maiming another soldier : § 221

(III) Tampering with eyesight :

(1) This article, as worded, would seem applicable to officers rather than soldiers, but the articles of war do not make the distinction.

(2) To be within this article the offender must be in command of a garrison, fort, or barrack.

- (IV) Stealing, or receiving when stolen, the property of comrade or military officer, band or mess : § 222
- (V) Purloining, or receiving when stolen, government property : § 210, 223
- (VI) Other offences of a fraudulent or felonious nature against any person, civil or military : § 224
- (VII) Any other disgraceful conduct, being of a cruel, indecent, or unnatural kind : § 225
87. Making, or being privy to, any false entry or erasure in description-book and records.
Withholding facts relating thereto :
88. Intentional false return of arms, ammunition, clothing, money, stores, provisions ; being concerned in, or conniving at, embezzlement of stores, or misapplication of public money, by means of false documents :
89. Evading orders or regulations on foregoing points :
91. Demanding extra billets :
Quartering families or servants without consent :
Freeing from billets for money :
95. Offences on recruiting service : (M. A. 51)
96. Refusing assistance to civil magistrate : § 165
97. Protecting from creditors on false pretences : § 168
98. Not doing best to prevent a duel : § 98
136. Absence without leave above twenty-one days : § 189
260. By the army service act, 1847 (10 & 11 Vict. c. 37, s. 7), no non-commissioned officer or soldier subject to its provisions is triable after the expiration of his service, [§254] except by a general, district, or garrison court martial.
261. The trial by court martial of the following offences is, by the terms of the mutiny act and articles of war respectively, restricted to a district or garrison court martial *only*.
Offences cognizable by district or garrison court martial only.
- M.A. 48. Wilful false answer at attestation : § 32, 1014
- A.W. 46. False confession of desertion : § 216
77. Drunkenness on appeal against fine : § 212_n
78. Drunkenness not on duty of soldier other than non-commissioned officer : § 213, 400
262. The offences, which are cognizable by a general, district, garrison, regimental, or other court martial are :—
Offences cognizable by any court martial.
- M.A. 38. Misconduct in respect to extension of furlough :
- A.W. 32. Disobedience of orders to attend school : § 1369_n.

Offences
cognizable
by any court
martial.

A.W. 50. Absence without leave [A.W.136 if under twenty-one days: § 189]

Minor offence, upon request of soldier:

70. Absence from parade, or quitting ranks:

71. Giving false alarms, *at home*: (1)

72. Not reporting prisoner:

73. Releasing without authority, or suffering the escape of, a prisoner:

74. Unnecessary detention of a prisoner, without trial:

75. Neglecting garrison or other orders:

78. Drunk on duty:

Non-commissioned officer drunk not on duty: § 213

92. Ill-treatment of landlords:

94. Overloading pressed carriages; ill-treating the waggon-ers; refusing certificates of the sums due:

100. Striking or ill-treating a soldier:

101. Hiring for duty, or conniving thereat:

102. Pawning, making away with, selling, spoiling arms, accoutrements, necessities, or medal; selling, losing, ill-treating horse: § 229

103. Malicious destruction of property:

104. Attempt at suicide: § 229

105. All crimes not capital, and all acts, conduct, disorders, and neglects, to the prejudice of good order and military discipline, not otherwise specified:

136. Absence without leave under twenty-one days: § 189

161. Disturbing proceedings of court martial: § 434-5

171. Misconduct when prisoner of war. § 124, 348

Distinctive
jurisdiction
of inferior
courts may
be extended,
except as to
desertion,
by the
superior officer,

263. Notwithstanding this classification, a general or superior officer is empowered to extend the jurisdiction of an inferior-court martial (its powers in regard to sentence on offenders being limited as at other times) over any offence cognizable by any court martial, which he is himself authorized to assemble; (2) except that desertion cannot, in any circumstances, be tried by a regimental court martial. (3)

who has
authority to
confirm the
sentence of
the prescribed
court

264. The general or superior officer cannot exercise this discretion in permitting the trial of a grave offence by an inferior court, unless he has the power of confirming the proceedings of that description of court by which it is

(1) The offence of "*intentionally*" place where committed.
occasioning false alarms is directed (2) A.W.136, 140.
(*Art. 55*) to be tried by a general (3) A.W.136.
court martial, without reference to the

cognizable under the provisions of the articles of war: or, at home, where the proceedings of all general courts martial are submitted to the Queen, unless he has a warrant to convene such courts, and consequently by implication, as assumed in this case, a discretionary power to dispense with their assembly. But abroad, an officer authorized merely to assemble general courts martial, or, at home or abroad, an officer authorized to assemble a district court martial cannot dispose of any case which is not clearly within the cognizance of that description of court, without the permission of the competent authority, that is, of the officer invested with the power of confirming the proceedings of the higher tribunal.

265. It had always been considered in the army, that an offence which a special article made cognizable by a general court martial, if charged in the express terms of that article, could not be tried by an inferior court. Mr. M'Arthur observed, "should a non-commissioned officer or soldier be brought before a regimental court martial for mutiny, desertion, or any of the higher crimes cognizable by a general court martial, he might not only plead the incompetency of the regimental court martial to try him; but should this regimental court, even without a soldier's availing himself of such a plea, proceed in the trial, and adjudge a punishment for a crime not within the jurisdiction of the court, the members would, collectively or individually, be liable to prosecution in a court of justice, for the illegality of their proceedings." (4) This reasoning, or rather this exposition of the law, still holds good, and is especially applicable, as commanding officers are expressly forbidden to give in against a prisoner "vague and indefinite charges," (5) and thus try before a regimental court martial, offences which are directed to be tried by general, or district, or garrison courts martial. In cases where these grave offences may admit of less serious notice, and when commanding officers

Grave offences may not be charged indefinitely, and thereby tried by an inferior court.

How a commanding officer shall proceed to extend the jurisdiction of minor courts martial.

(4) M'Arthur, 1813, i. 168.

(5) A.W.140. Previous to the direct injunction to the contrary in this article, it was customary to modify the charge, so as to avoid the express offence declared cognizable by a superior court, and, by these means, to bring it within the jurisdiction of an inferior

court martial. Thus facts which might amount to mutiny have been charged as disorderly conduct, to the prejudice of good order and military discipline; desertion has in like manner been charged as absence without leave; but any such practice is now absolutely prohibited.

Permission to be obtained from the superior officer,

and referred to in the heading of the proceedings.

Authority for extending the jurisdiction of an inferior court martial to be laid before it.

The want of it vitiates the proceedings.

Trials on the line of march for gross insubordination, and on board ship.

shall deem it advisable to proceed to trial by a district, garrison, or regimental court martial, they are enjoined to lay a statement of the case, together with the charge they intend to bring, before the general or other officer commanding the brigade, district, or garrison, with an application so to proceed; who is to exercise his discretion in directing the description of court by which the offender shall be tried. Should he accede to the application, the hundred and fortieth article of war of the present year for the first time provides that his permission shall be recorded in the heading of the proceedings of such court, in addition to being noticed as hitherto in the monthly return of courts martial sent to the adjutant-general. (6)

266. Though it is not directed by the article, it would seem desirable that the permission of the superior officer to try a soldier for a crime expressly declared to be cognizable by a superior court, should be laid on the table, or otherwise brought to the notice of the court martial of inferior jurisdiction, as their authority for the variation in the heading of the proceedings, inasmuch as the members of a court martial are not only responsible to military authorities, but are amenable to courts of civil judicature, for any undue exercise of jurisdiction or illegal assumption of power.

267. Where an inferior court martial has proceeded without due permission to the trial of an offence triable by a superior court, the sentence "cannot be legally enforced." (7)

268-9. Offences on the line of march had been previously expressly excepted from those, for the trial of which recourse must be had to the discretionary power vested in the general officer; and it has now for many years been provided that not only on the *line of march*—and that, whether halting, (8) or on the move, and whether by railway, canal, dâk, or other mode of conveyance—but also on board of any ship, not in commission, the jurisdiction of a *regimental or*

(6) A.W.140.

(7) Letter, J.A.G. Office, 16th Jan. 1867.

(8) When distinctive penalties were awarded for habitual drunkenness "*on the line of march*," it was explained

that the phrase in this connection applied only to the time during which the soldier was "actually on his day's march from one station or halting-place to another."—Q.R. (1866) App. No. 5, 23 note.

detachment court martial may be extended to mutiny or insubordination, accompanied with personal violence, or other offences, in the discretion of the officer in immediate command of the troops, by whom the sentence, not exceeding that which a regimental court martial may ordinarily award, may be confirmed and carried into execution on the spot; every sentence so confirmed being noticed in the monthly return of courts martial, and, if on the line of march, reported to the general commanding. (9)

(9) A.W.135. M.A. 11. § 312.

CHAPTER VI.

GENERAL AND DETACHMENT GENERAL COURTS MARTIAL.

General Courts Martial.

Constitution.

270. GENERAL courts martial, as provided by the mutiny act, [sec. 6] may be held by special commission or warrant under the sign manual. They are ordinarily convened by officers duly authorized by warrant in that behalf. (1)

Composition.

271. General courts martial in the English army, originally consisted of twelve members besides the president, according to the Swedish, Dutch, and German custom. In the time of James II. "the council of war, or court martial," was to consist of seven at least, which Sir James Turner describes as the French practice; (2) but from the time of the first mutiny act in 1689 until the year 1868, general courts martial have consisted at home, as at first, of *thirteen* commissioned officers. In that year the number was reduced to *nine*; but with the proviso, that each of them shall have a commission from Her Majesty for three years before the assembly of the court. The article of war embodies this proviso, as respects all other cases, and fixes the minimum in the East Indies, Malta, and Gibraltar at *nine* as at home; in Nova Scotia or Bermuda at *seven*; and in any other colony, or out of the Queen's dominions, reduces it to five. (3)

All general courts martial are moreover necessarily attended by a judge advocate, or person officiating as such. (3)

when legally
sufficient,
for trial of
field officers,

272. The composition of a general court martial, as regards its legal competence, is not in any case affected by the rank of the prisoner, except that no field officer can "be tried by any person under the degree of captain." (4)

(1) See before, §7-11; Appendix (sec. 8) provides only for the British Isles. See §2.

(2) Pallas Armata (1683), 208.

(4) M.A.13. A.W.152.

(3) A.W.106. The Mutiny Act

This provision in the articles of war dates back from the very first, and is absolute under all circumstances. It was only in 1837 that additional rules [§19, 20] were prescribed in the general regulations. These, as now modified, have been already quoted; and they are necessary to be observed, if possible, in forming the detail of these courts, when ordered for the trial of commanding officers of corps, or other officers.

and other
classes of
officers.

273. The president is appointed, under the restrictions already specified; [§16, 17] sometimes, as in India, in orders, but more usually by warrant, which is the course contemplated in the authorized form of proceedings. The warrant may be, either for the trial of a prisoner specially named, or generally "for the trial of such prisoners as may be brought before the court;" or else it may be, "for hearing and examining into such matters as may be brought before the court," which last form appears that which may be preferably used; it is applicable on appeals from regimental courts of enquiry, and on all other occasions. (5)

Appointment
of president,
by warrant
at home,

or abroad by
warrant or
order,

274. The other officers to form the court are appointed in orders, [§21] except in the now uncommon case of their being named in the warrant.

and other
members.

275. Warrants for holding general courts martial have been issued under the sign manual, directed to the judge advocate general, appointing the president, and embodying the charge, and have in several instances specified the names of all the officers appointed to form the court. (6)

Convention by
warrant.

276. General courts martial for the trial of officers and non-commissioned officers of the volunteer permanent staff, consist of not less than nine members. The president must be a field officer of the volunteer force appointed by the secretary of state, [§5] and the other members officers of the volunteer permanent staff. (7)

For the trial of
permanent
volunteer staff.

277. General courts martial *only* are competent to try *every* description of person subject to the mutiny act, and *every* offence declared under it, and to award the punishments of death and penal servitude (8); they can receive appeals from regimental courts of enquiry, under the thirteenth article of war; and can alone supply the place of courts

Distinctive
jurisdiction.

(5) See form, Appendix XI.

(7) Volunteer Act, s. 22, 1863.

(6) This precedent was followed in the case of the Canadian rebels, tried at Montreal in 1838 and 1839.

[§22a]

(8) M.A.8.

and powers, of civil judicature for the trial of civil offences. (9) The peremptory and discretionary punishments which general courts martial are called upon to award, in the case of commissioned officers, [§114] warrant officers, [§130] non-commissioned officers and soldiers, [§118] have been already detailed, and the proceedings and confirmation of trials by these courts will be considered in detail in subsequent chapters.

Detachment General Courts Martial.

278. This description of court was first established, by the act 53 Geo. 3, c. 99, for amending the mutiny act of that year (1813), with a view to repress the spirit of plunder and outrage which had broken out in the army after the battle of Vittoria, upon the strong representations of the Duke of Wellington to the authorities at home. (1) Until the year 1860 they could be assembled only "out of Her Majesty's dominions;" but the mutiny act of that and subsequent years has declared it lawful to convene them in any place "beyond seas," where it may be found impracticable to assemble a general court martial, (2) and where there is no civil tribunal competent to try the crime.

279. In these circumstances a detachment general court martial consisting of *not less than three* officers, who may be convened, *without* (3) *a warrant* from Her Majesty, by any officer commanding any detachment or portion of troops, *upon complaint* made to him of any crime or offence committed against the property or person of any *inhabitant* or *resident* in the country, by any person serving with or belonging to Her Majesty's armies, being under the immediate command of such officer.

280. These courts martial "have the same powers, in regard to sentence upon offenders, as are granted by the mutiny act to general courts martial." (4) The hundred and seventeenth article also expressly recognizes their "power to pass sentences of death or penal servitude."

281. The terms of the mutiny acts have for many years

(9) M.A.101. A.W.143, 145. This contingency is not enlarged upon in this place, as trials for criminal offences will be referred to in the last chapter of this work.

(1) See the letters from Lord Bathurst and the Duke of York accom-

panying the act.—Supplementary Despatches of the Duke of Wellington, viii. 104–107.

(2) M.A.12. A.W.107.

(3) A.W.107. See before, §4.

(4) M.A.12. A.W.124.

Detachment
general courts
martial

were lawful
only out of
the Queen's
dominions,
but are now
extended to any
foreign station.

Minimum
number of
members.

Held on
complaint of
inhabitant,

have powers of
general courts
martial,

to sentence
death.

Distinctive
jurisdiction;

prevented a doubt, (5) which had previously existed, as to the competency of this court martial to entertain a charge against an officer, as it declares it may be convened by "any officer commanding, . . . upon complaint made to him of any offence committed against the property or person of any inhabitant, . . . by *any person* serving with or belonging to Her Majesty's armies, being *under* the immediate command of any such officer." The words *any person* clearly comprehend *officers* under the immediate command of the officer, who may be authorized to convene the court.

Distinctive jurisdiction over persons;

282. It is particularly to be remarked, that this court martial can only be held upon *complaint* of an offence against an *inhabitant* or *resident*. In ordinary cases, as for any breach of discipline, the detachment general court martial has no jurisdiction. In 1849 these courts were held for the trial of insurgents at Cephalonia; and now that they may be held within the Queen's dominions beyond seas, it would seem very desirable, in the event of a proclamation of martial law in any of the colonies, that they should be held in preference to any less regularly constituted tribunal. [§ 441]

over offences by persons subject to the mutiny act,

283. The court, as before noticed, may consist of three officers, and it is expressly provided by the hundred and fourteenth article of war, that the president may be under the rank of captain. The officer commanding the detachment is not debarred from appointing himself president, as the same article also provides that, "In the case of a detachment general court martial, the officer convening such court may be the president thereof."

or by insurgents dealt with as if belonging to the army.

Composition.

Rank and appointment of president.

284. An officer of whatever rank may therefore, in the special cases particularized, convene this peculiar court martial, provided only there are two commissioned officers under his command who are available as members. The abuse of such extraordinary power is guarded against by the provision that no sentence "shall be executed until the general commanding the army of which the division, brigade, detachment,

Peculiarity of constitution of the court does not open the door to abuse of power, by a subaltern detached, as the sentence must in all cases be referred to a general officer.

(5) Older acts specified the persons amenable to this court martial, as "any non-commissioned officer, soldier, or other person;" in other parts of the same statute, officers, when intended to be comprehended, were invariably named first. It was thus by no means clear that officers could be understood,

or were intended to be included, in this case—particularly when the general rule for the construction of statutes was considered, "that where things or persons of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words."

or party, forms part, and to which any person so tried, convicted, and adjudged, shall belong, shall have approved and confirmed the same." (6)

Advantages of
these courts
martial in
special cases.

285-9. It may be observed that the detachment general court martial is designed, and is well calculated to effect a very important object — the investigation of an alleged offence on the spot where it may have been committed. The evidence of the aggrieved inhabitant may be received, by its intervention, without inconvenience, though the detachment to which the offender belongs may be on the line of march, or on detached duty at a considerable distance from the headquarters of the army. This court is calculated to be especially useful on the march of detachments from depôts or hospitals on the lines of communication of armies. Such detachments are rarely attended by a provost marshal, and great excesses, therefore, might be committed on the people of the country with impunity, if a court could not readily be convened to receive their evidence; for in many cases it would be impracticable to convey to head-quarters inhabitants whose testimony may be essential to the ends of justice and discipline.

(6) M.A.12. A.W.124.

CHAPTER VII.

DISTRICT OR GARRISON COURTS MARTIAL.

290. GENERAL courts martial, and regimental or garrison courts martial, so called as they were convened by the commander of a regiment or garrison, have been known to British military law from the time that courts martial succeeded to the jurisdiction of the general or judge marshal. The district or garrison court martial, (1) however, is of comparatively recent origin, having been first established by the mutiny act and articles of war for the year 1829, in the place of general regimental courts martial. (2)

District or
garrison courts
martial;

291. It is convened either by officers in command thereto authorized by warrant under the sign manual, or by Her Majesty's delegated authority. The general warrants (3) of officers in command abroad, and special warrants of (4) officers commanding districts and divisions at home, each year empower them to convene district or garrison courts martial; and also to direct their warrant to any officer, under their command, who has the command of a body of forces, which at home must not be less than four troops or companies, authorizing such officer, not being however below the degree of a field officer, except in detached situations beyond the seas where a field officer is not in command, in which case constitution.

(1) These courts are not unfrequently convened in circumstances when both of the alternative names are equally unsuitable; whereas the name "*Brigade*" court martial, which some years ago it was intended to have given them, but which appears to have been lost sight of, would be as applicable in garrisons as in the field or in cantonments.

(2) From the year 1812 to the year 1829 general regimental courts martial had been held by regimental commanding officers duly empowered by warrant under the sign manual, and

consisted exclusively of officers of the same regiment. They were attended by a judge advocate; as was also the district court martial for the first year of its introduction into the service. Their jurisdiction extended over the soldiers of the particular regiment for which the warrant was granted, the commanding officer was authorized to appoint himself president, and they were, in certain cases, empowered to award transportation.

(3) Appendix II. III. IV.

(4) Appendix V.

a captain may be authorized to convene district or garrison courts martial. (1)

Composition
and numbers,
at home
and abroad ;

consisting of
officers of
different
or the same
corps.

For trial of
volunteer
permanent staff.

President :
appointment
and

duties of.

Jurisdiction of
garrison
court martial.

292. The mutiny act prescribes that every district or garrison court martial, convened within the United Kingdom or British Isles, shall consist of not less than seven commissioned officers ; and the articles of war further direct that it shall not consist of less than seven in the East Indies, Malta, and Gibraltar ; of five, if convened in Nova Scotia or Bermuda ; and if convened in any other colony, or beyond the Queen's dominions, of not less than three. (2) The hundred and ninth article further explains that it may be composed of any officers of different corps, of officers of the artillery, engineers, marines, and general staff, or that it may be entirely composed of officers of the same corps (3) ; but in practice the district court martial is not entirely composed of officers belonging to the same regiment as the prisoner, when officers of other regiments are available.

293. District courts martial for the trial of non-commissioned officers of the volunteer permanent staff consist of not less than five members, the president being a field officer appointed by the secretary of state, [§5] and the members officers of the volunteer permanent staff. (4)

294. The president is appointed by, or under the authority of, the officer convening the court, under the limitations which have been already noticed. [§15-17] The president, as at other minor courts martial, stands in the place of a judge advocate. (5) He summons witnesses when so required by the prosecutor or prisoner (6), administers the prescribed oaths to the other members, and transmits the original proceedings to the judge advocate general in London. (7)

295. The jurisdiction of a district or garrison court martial

(1) M.A.6. A.W.110.

(2) M.A.9. A.W.111.

(3) In the corresponding article of 1844, an exception was first inserted—the article from that time providing that the district or garrison court martial, “except for the trial of warrant officers, may be entirely composed of officers of the same regiment.” This exception is not further noticed in this place, as “district” courts martial for the trial of warrant officers, as constituted under the 111th article, and the

points of difference between them and district or garrison courts martial are subsequently adverted to, §304-306.

(4) Volunteer Act, 1863, §22(1).

(5) As to the duties of the president, see §430.

(6) M.A.13. For the first year after their introduction into the service the presence of a judge advocate was required at district courts martial, but the mutiny act and articles of war of 1830 dispensed with it.

(7) A.W.157.

as to the cognizance of crime, has been noticed [§259-262] when referring to the distinctive jurisdiction of courts martial over offences. It differs from a general court martial as not being competent to entertain a charge against a commissioned officer, or an appeal from a regimental court martial, or, unless by permission, [§263] to try offences, except desertion, that are punishable by death. An alteration introduced in the articles of 1862 provided that warrant officers may be tried by "district or garrison" courts martial. The peculiarly constituted district court martial for the trial of warrant officers still however remains in the articles of war.

Jurisdiction of district or garrison court martial,

extended to the trial of warrant officers, although the specially constituted district court is retained.

296. A district or garrison court martial has the same power as a general court martial to sentence any soldier to such punishments as accord with the provisions of the mutiny act [§118-123], except that death and penal servitude cannot in any case be adjudged by it; (1) and that, in the case of warrant officers [§130], it is not authorized to award imprisonment.

Powers.

Wherein different from a general court martial.

297. There used to be a further distinction between district or garrison courts martial and general courts martial. The mutiny act gave, as it still gives, the same powers of imprisonment to both kinds of courts martial; but until the regulations were modified in 1864, they limited the duration of imprisonment by district courts martial to six months. In that year this restriction was so far modified, that in very grave cases district courts martial were empowered to award the full amount of two years' imprisonment. In 1869 the same powers, in respect to forfeitures and sentence of discharge with ignominy, were given by the articles of war to these courts as were given to general courts martial, district courts martial having previously had these powers only in cases of desertion and disgraceful conduct.

Formerly limited to six months' imprisonment,

but district courts martial now have the same powers as general courts in this respect, and as to forfeitures, &c.

298-300. These enlarged powers were given to these courts with the view of enabling them to deal with all ordinary cases of crime among non-commissioned officers and soldiers; and it is laid down in the regulations (2) that "the higher tribunal of a general court martial is not to be resorted to, except in aggravated cases, for which the more severe punishment of penal servitude or death may be awarded."

with the view of less frequent resort to the higher tribunal.

(1) M.A.9.

(2) Q.R.S.6,p.50.

Proceedings,
how forwarded
to confirming
authority.

301. The proceedings [§475] are forwarded for confirmation to the general or other confirming officer by the president through the proper channel, "or to army head quarters where there is no general officer in command." (3)

Confirmation,

under mutiny
act ;

under volun-
teer act.

302. The officer empowered, by warrant under the *sign manual*, or under Her Majesty's delegated authority, to convene these courts, or, in his absence, the officer on whom the command may devolve, is authorized to confirm the proceedings ; to cause the sentence to be put into execution ; or to suspend, mitigate, or remit the same, as may be best for the good of the service. (4) The volunteer act provides that the sentence of a district court martial for the trial of a non-commissioned officer of the volunteer permanent staff, [§293] is not to be put in execution until confirmed by a secretary of state authorized in that behalf by warrant under the *sign manual*. (5)

Proceedings
how disposed
of, under
articles

and Queen's
Regulations.

303. The original proceedings of district or garrison courts martial, after they have been duly confirmed and promulgated, are required to be transmitted by the president (6) without delay to the judge advocate general in London, in whose office the article directs they shall be carefully preserved, but, as provided in 1868, not necessarily for more than three years. (7) The Queen's Regulations (8) direct, that "on home service the proceedings are to be sent by the president under cover to the deputy judge advocate of the district, who will submit them to the judge advocate general, at the same time drawing his attention to anything requiring notice in the proceedings."

Court for the Trial of Warrant Officers.

District courts
martial for the
trial of warrant
officers ;

304. The articles of war point out the composition and peculiarities attaching to the court martial, now termed *District*, but formerly *Detachment*, (1) for the trial of warrant officers. These courts martial are appointed by order

(3) Q.R.App.A.p.23.

(4) Appendix V.

(5) Volunteer Act, 1863, sec. 22.

(6) This mention of the president renders it necessary to return the proceedings to him, which in many cases is attended with great inconvenience, as

for example when he has left the station.

—As to covering letter, see § 486n.

(7) A.W.157. Q.R.App.A.p.24.

(8) Q.R.App.A.p.24.

(1) See article of war of 1828 and previous years : "Whereas the situation of officers not commissioned by

of the general commanding the district, if convened at home; or, if elsewhere, by the general commanding-in-chief on the station. They are in no case to consist of less than *seven* commissioned officers, except in Bermuda, the Bahamas, the Cape of Good Hope, the settlements in southern or the western coast of Africa, Saint Helena, British Columbia, Vancouver's Island, Jamaica, Honduras, Newfoundland, New Zealand, the Australian colonies, the Windward and Leeward Islands, British Guiana, Hong Kong, the Prince of Wales Island, Singapore, Malacca, and the settlements on the coast of China, or in the East Indies, where they may consist of *five*, (2) of whom, in either case, not more than two are to be taken from the regiment in which the warrant officer to be tried may be serving, nor more than two under the rank of captain. (3) The president cannot be under the degree of a field officer, unless a field officer cannot be had, and in no case under the degree of captain. (4) No court martial can sentence a warrant officer to corporal punishment. (5)

constitution ;

composition

president ;

limitation of sentence ;

305-9. The most important distinction between this and other minor courts martial was done away with in the year 1857, by omitting the clause in the article of war, which provided that the sentence of a district court martial upon a warrant officer should not be put in execution till confirmed by Her Majesty, if the court were held at home. This obsolete provision involved the necessity of transmitting the

confirmation.

us, or by any of our general officers having authority from us to grant commissions, but appointed by warrant under the signature of the colonels or commandants of the corps to which they belong, has not been hitherto defined, in regard to their being liable to be tried, otherwise than by a general court martial; and it appearing to be highly necessary that our royal pleasure should be declared and made known touching the mode of trial for such officers; We do accordingly direct, that in all cases where the offence charged against any warrant officer may not be of so heinous a nature as to require investigation by a general court martial, such officer may and shall be tried by a *detachment* court martial, to be appointed, which detachment courts martial are

to be held and proceed in the nature of regimental courts martial."—Articles of War, 1828, sec. 16, art. 17.

(2) A.W.111. The district or *garrison* court martial in the East Indies must consist of seven officers; and in the other direction in the Bahamas, Cape of Good Hope, Saint Helena, Prince of Wales Island, Singapore, Malacca, British Columbia, Vancouver's Island, and in the settlements on the western coast of Africa, &c., they may consist of not less than *three* officers.—See § 292.

(3) A.W.111.

(4) A.W.114.

(5) A.W.126. See the discriminative punishments applicable under this article by general and district or *garrison* courts martial respectively, § 296, 130.

proceedings to the judge advocate general for decision, as in the case of all general courts martial held at home: but the proceedings of district courts martial for the trial of warrant officers are now, in all cases, dealt with as those of ordinary district or garrison courts martial.

Proceedings.

CHAPTER VIII.

REGIMENTAL AND DETACHMENT COURTS MARTIAL.

Regimental Court Martial.

310. THE commissioned officers of every regiment, bat-
 tion, brigade [-depôt], or regimental dépôt, (1) or of a
 detachment of ordnance corps, or army service corps, com-
 manded by an officer not under the rank of captain, may,
 by the appointment of their colonel or commanding officer,
 without other authority than the rules and articles of war,
 hold *regimental* (2) courts martial. The court consists of
 not less than *five* officers, unless it be found impracticable
 to assemble that number, when *three* may be sufficient. (3)
 They have authority to *enquire* into such *disputes* and
 criminal matters as may come before them, (4) and are em-
 powered to punish such offenders as, being within their
 jurisdiction, may be brought before them.

Constitution ;

composition ;

for what pur-
pose held.

311. The president cannot be the commanding officer, (5)
 nor under the rank of captain, except on the line of march
 or on board a ship not in commission, or at any place where
 a captain cannot be had, and is appointed by or under the
 authority of the officer convening the court, (6) according to
 a roster kept for that duty. (7) The proffer of challenge to
 the prisoner, the swearing of the court, and other proceed-

President.

Proceedings.

(1) When any portion of a regiment
 or battalion is attached for duty to an-
 other regiment or battalion, the officers
 and men of both such regiments or
 battalions are to be deemed to belong
 to one and the same regiment for all
 purposes of trial by regimental court
 martial.—A.W.112.

Courts martial convened by order of
 officers commanding brigade-depôts
 are designated Regimental Courts
 martial.—Q.R.App.B.(1)*Note*.

(2) Courts martial, similar to regi-
 mental courts martial, are held for

the trial of marines, and are termed
 divisional courts martial. M.M.A.10.
 M.A.W.98.

(3) A.W.112. M.A.10. There was
 not a corresponding clause in any mu-
 tiny act before 1846. The convening
 authority decides as to the occasion for
 the lesser number, and is responsible to
 his military superiors for any abuse of
 the discretion vested in him.

(4) A.W.112.

(5) A.W.112, 114.

(6) A.W.114.

(7) Q.R.S.8,p.2. See remarks, §21.

Oath by
members.

ings, are the same as at district courts martial, and will be considered hereafter. The latter part of the oath, which refers to the non-disclosure of the vote or opinion of any particular member, was not directed to be taken by members of regimental courts martial, before the year 1829; nor was any oath required to be taken by the members of regimental courts martial, or by witnesses examined before them, until 1805.

Jurisdiction

extended by
superior officer,
or on line of
march, or on
board ship.

312. The jurisdiction of a regimental court martial extends to the trial of all non-commissioned officers and men belonging to the corps in which it is held, subject to a special limitation created by the army service act, which has been already [§ 254] quoted. Its ordinary jurisdiction over offences has been noticed, [§ 262] when referring to the distinctive jurisdiction of courts martial; and also the extension of it by the previously obtained authority of a general or superior officer [§ 263]; and also its special enlargement on the line of march, or on board ship; [§ 269] but without any alteration of its powers in respect to punishment in either of these cases, except that on board any ship not in commission corporal punishment may be awarded for mutiny or other offences specified in the mutiny act (*sec.* 22), and the hundred and eighteenth article of war. All sentences of courts martial held in these circumstances are brought under especial notice. The sentence of any court martial confirmed by the officer in command of the troops on the spot must, as required by the article of war, be reported to the general officer. (1)

Absence
without leave.

313. This court cannot try a soldier for absence without leave exceeding twenty-one days without the permission of the general or other officers commanding the brigade, district, or garrison. (2) Desertion is a crime not within its competence, nor in any instance to be included amongst those offences which may admit of less serious notice, and which it may be advisable to try by regimental courts martial. (3)

Powers, as to
punishment;

314. Besides the additional punishments of stoppages of pay under the provisions of the hundred and thirtieth article of war; [§ 689] and punishments applicable to non-commissioned officers; [§ 126] all of which may be awarded

(1) A.W.135. *See* Q.R.(1868)1312. (2) A.W.136. (3) A.W.136, 140.

by *any* court martial, and which it is not necessary to recapitulate in this place;—the punishments which a regimental court martial is empowered to award, and which cannot be exceeded in cases of the extension of its jurisdiction over offences, are the following: *corporal* punishment in the exceptional circumstances specified in the mutiny act and articles of war, to the extent of, but not exceeding, *fifty* lashes; (4) *imprisonment*, not in any case in addition to a sentence of corporal punishment, (5) but with or without hard labour, for any period not exceeding *forty-two* days; (6) *solitary* confinement, by itself, not exceeding *fourteen* days; (1) and imprisonment, part solitary and part otherwise, not exceeding together *forty-two* days, the portions of solitary confinement not exceeding fourteen days at a time, and with an interval between them of not less duration than the periods of solitary confinement; (2) and, on conviction of drunkenness, a fine *not exceeding* one pound. (3)

as to awarding punishment.

315. The proceedings, after being signed by the president, are usually handed by him to the commanding officer in person; or, sometimes enclosed to him in a sealed cover. The sentence of a regimental court martial cannot be executed until confirmed by the commanding officer, (4) whether he was, or was not, in command of the regiment when the court was convened.

Sentence confirmed by commanding officer.

316. The charges, finding and sentence of regimental courts martial are entered in the regimental court martial book, verified by the signature of the commanding officer. The original proceedings, signed by the president, and countersigned by the commanding officer, are kept one year after the release of the prisoner from imprisonment, if any, or else from the date of trial. (5)

Proceedings entered in court martial book.

317. Regimental courts martial are sometimes convened

Regimental courts martial of enquiry;

(4) M.A.22. A.W.118, §119.

(5) M.A.23. A.W.119.

(6) M.A.27. A.W.129.

(1) A.W.121.

(2) A.W.129, §211.

(3) A.W.77.

(4) A.W.129. A provision, which contemplated the approval of regimental courts martial by governors of garrisons, and had existed in the articles of war for a series of years, was expunged in 1846. The occasions, where it was desirable to act

upon it, were indeed seldom, but it enabled the commanding officer of a regiment, when anything of a personal nature rendered the duty of confirmation by him a delicate or unpleasant task, to refer the proceedings to the governor for approval.

(5) Q.R.S.26, p.41. A soldier tried by a regimental court martial may be allowed to receive a copy of the proceedings on making application, and on payment of the expense.

are within the provisions of the articles, but

are no longer summoned for doing justice on the complaint of soldier.

for the purpose of enquiry, and it would seem that the prevalence of such custom, to the frequent exclusion of courts of enquiry, would accord more with the intention of the articles of war, as it is expressly stated that they may be held to enquire into such disputes as may come before them; (6) and the form of oath for witnesses has, for a long series of years, extended to matters other than the trial of prisoners. (7) In such cases, a report or opinion on the dispute, or criminal matter, brought before the court, is required; but the practice of the service has set in the other direction, and by an alteration in the articles of war of 1860 a regimental court of enquiry [§ 340] has replaced the regimental court martial, which for more than a century and a half had been the established tribunal—in the words now expunged from the thirteenth article;—"for the doing justice to the soldier complaining."

Detachment Courts Martial.

Detachment courts martial were temporarily discontinued.

318. The court now denominated a detachment court martial (from the temporary suspension of which (1) the inconvenience to be apprehended from its permanent abrogation may be judged), had formerly been termed garrison, district, line, brigade, detachment, or camp court martial; its appellation varying according to the nature of the command of the officer convening the court.

Convention of,

319. The composition of these courts is now prescribed by the mutiny act; (2) but they are held without other authority than the articles of war, by order of the senior officer in command of the detachment, district, station, garrison, barrack, island or colony, *provided* he be not under the rank of *captain*; or, in case of embarkation on board any transport ship, convict ship or merchant vessel, or troop ship not in commission by the appointment of the senior on board, whatever be his rank. (3)

Limited to captain, except on board ship.

(6) A.W.116.

(7) The author was a member of a garrison court martial, held at Loughrea, in the year 1807, by order of the commander of the forces in Ireland, for the purpose of investigating the circumstances connected with an affray which had occurred between the main guard and some of the inhabitants. No person was charged before the court, but the evidence received was entirely on oath, and an

opinion as to the cause, origin, and circumstances connected with the affray was required.

(1) The articles of war bearing date 24th March, 1829, contained no provision for the constitution of a court martial of this description; the omission was supplied by a supplementary article in the November following.

(2) M.A.10.

(3) A.W.113.

320. They are not to consist of less than *five* officers, who may belong to one or several corps, unless it be found impracticable to assemble that number, when *three* are sufficient. (4) Composition.

321. The president cannot be the officer ordering the court to assemble, nor, except on the line of march or on board ship, or in any place where a captain cannot be had, under the rank of captain. (5) President.

322. They enquire into such disputes, and criminal matters, as may come before them, according to the rules and limitations observed by regimental courts martial. (6) Jurisdiction.
The superior officer on the spot, not being a member of the court, has authority to confirm the sentence in all cases; and this he must equally do, even when he may refer the proceedings to the superior officer under whom he may be serving. The officer commanding the detachment must also order the court to reassemble in cases requiring revision. (7) Confirmation,
and revision.

323. Except that a detachment court martial may entertain charges against a soldier of any corps, and a regimental court martial only against soldiers of the particular regiment in which the court is formed, the jurisdiction and powers of a detachment court martial are precisely identical with those of the regimental court martial which has been treated of in the former part of this chapter. Jurisdiction
and procedure
identical with
regimental
courts martial.

324-29. The Queen's Regulations require that the charges, finding and sentence of detachment courts martial should be entered in the court martial book, and the original proceedings kept for a year, in the same manner as regimental courts martial. (8) and minutes
of proceedings
preserved in
the same
manner.

(4) A.W.113.

(5) A.W.114.

(6) A.W.113.

(7) A.W.129.

(8) Q.R.8.23,p.41.

CHAPTER IX.

COURTS OF ENQUIRY.

Recent
legislation has
created courts
of enquiry
other than
those dependent
on custom.

330. COURTS of enquiry, or “boards of enquiry”—as they used generally, and perhaps more appropriately, to be called—are of two kinds: First,

Those which had been previously sanctioned by the recognized custom of the service, and for the first time received a formal sanction in the regulations of 1868: (1)

Secondly, Those of a more definite character, which have been established, for the most part in late years, by the express provision of the articles of war, [§ 341, 345] the Queen’s Regulations, [§ 348] and an act of parliament. [§ 349]

Courts or boards
of enquiry, con-
stituted by
warrant, or

331. Courts of enquiry,—other than those last mentioned, which will be separately noticed hereafter, [§ 341–9]—are appointed by warrant directed to the judge advocate general, under the sign manual, appointing the officers to examine and enquire touching the matters therein mentioned, and authorizing the judge advocate to summon such officers as may be deemed expedient for the investigation committed to it; (2) or, simply by order from the sovereign; the commander in chief; a general, or other officer in command of a body of troops, of a regiment, or even of a detachment. These boards, or courts of enquiry, depend on, or are an emanation from, the royal prerogative of “the sole supreme *government* and command of all forces, both by sea and land.” [§ 81] The power of the crown, or of a commander of the forces, to appoint courts of enquiry, and the right, upon the ground of injury to the public service, of withholding the proceedings, as being privileged communications, when called for as evidence in a court of law, was

by order of
the sovereign,
or of a superior,
or commanding
officer,

are recognised
by the civil
courts,

(1) Q.R. (1868) 785–7. Repeated enquiring into the causes of the failure of the Rochefort expedition, 1767.—Q.R.S.6.p.67–69.

(2) See warrant by George II., for Tytler, Appendix V.

ascertained in the year 1820 by a decision (3) of the chief justice of the king's bench, which was confirmed on appeal to the exchequer chamber, and has been upheld in a series of subsequent decisions.

and their report has been long held to be privileged.

332. Another point has recently been brought before the courts of law. It is a well-established principle that all witnesses are absolutely protected against an action for damages in respect to any evidence given by them on oath before a judicial tribunal, and it has now been ruled by a recent judgment of the court of error—subject to the pending appeal to the house of lords—that this principle extends to the case of witnesses (at least of military witnesses, who are bound to attend the enquiry) in respect to statements made by them in the course of their examination before a military court of enquiry, although not a judicial body and the statements before it not upon oath, nor, if false, punishable as perjury. (4)

The protection of witnesses in a judicial proceeding

has been extended to statements before a court of enquiry.

333. The duties of courts of enquiry are undefined; they depend on the instructions which the authority convening the court may think proper to give. A court of enquiry, deriving its power from the express authority of the officer convening it, may be invested, as to enquiry and the examination of persons who may be called before it, with any authority, not exceeding that possessed by that officer. It may be re-assembled as often, and with such alteration in its composition, as he may direct; and on such re-assembly it may be required to give an opinion or revise its former opinion, or to re-open or enlarge the original enquiry.

Duties undefined and dependent on the order of formation;

(3) *Home v. Lord F. C. Bentinck*. 2 Broderip & Bingham, 130.

(4) The question was raised in 1866 in an action in the Court of Common Pleas by Lieutenant Colonel Dawkins against Major General Lord Rokeby. Mr. Justice Willes held that in what he did as a witness before a court of enquiry, he was protected as a witness, and nonsuited the plaintiff. (4 Foster & Finlason, 808-842.) Colonel Dawkins brought another action against the same defendant in the Court of Queen's Bench in respect to certain statements before the court of enquiry. Mr. Justice Blackburn held that an action was not maintainable, even assuming malice, and rejected evidence that the statements were wilfully false. A bill of exceptions was tendered to the direction of the learned judge, and it was argued

before the chief baron (Sir Fitzroy Kelly) and nine other judges in the Exchequer Chamber in February 1872. At the conclusion of the arguments the Lord Chief Baron said: "We are all of opinion that these exceptions must be overruled, but the case is of such extraordinary importance, and, perhaps I may say, of such novelty, at least in the application of well established principles, that we think it better to defer our judgment until a future day, in order to deliver it with greater deliberation." (*Times*, Feb. 15, 1872.)

The judgment was eventually delivered the 1st Feb., 1873, and will be found, *in extenso*, § 1363. The plaintiff appealed to the house of lords, and the case came on for hearing on the 6th May, 1874, but was postponed for the attendance of the judges.

not a judicial
tribunal, has no
power to
administer
oaths;

civil witnesses
not compelled
to attend.

Purpose and
application of
courts of
enquiry;

when as-
sembled for
preliminary
investigations
to ascertain
the expediency
of legal
trial.

334. A court of enquiry is not, in any light, to be considered as a judicial body; nor has any court of enquiry, except that to record the illegal absence of soldiers, [§ 347] any power to administer an oath, (5) nor is there any process by which, in this, or in any other case, to compel the attendance of witnesses not military. And even the controlling power over military men, which compels their attendance before courts of enquiry, and the obligation to answer questions or make statements in the course of the enquiry, arises from the order of a superior officer, and not from any authority, either inherent or communicated, which courts of enquiry may be supposed to possess. A court of enquiry is rather a council than a court, of which any officer in command may take advantage to assist him in arriving at a correct conclusion on any subject, on which it may be expedient for him to be thoroughly informed. It is sometimes employed to receive and methodize information only; at other times, to give an opinion also on any proposed question, or as to the origin or cause of certain existing facts or circumstances. The transactions relating to an armistice or convention; (6) the causes leading to the failure of an expedition, sometimes with, at other times without, direct reference to the commander or other general officer employed, have been submitted to the investigation of a court of enquiry, a strict examination having been enjoined, and a report and opinion required. When facts or circumstances bearing on the conduct or character of officers or others, are submitted to the investigation of courts of enquiry, with a view to ascertain the expediency of a court martial, it would seem to accord with ordinary conceptions, as with

(5) The letters patent of the judge advocate general [§ 1281] empower him "at such times as martial law shall be allowed to be exercised," and also his "sufficient deputy or deputies" (but this does not extend to officiating judge advocates, appointed by officers commanding the forces abroad) to administer an oath to witnesses before any commissioners appointed to examine any matter concerning any military affairs whatsoever. As to administering oaths, *see* 14 & 15 Vict. c. 99, s. 16.

(6) Enquiry as to the armistice and

conventions in Portugal, in August, 1808. With reference to this enquiry, the Duke of Wellington (then Sir Arthur Wellesley), in his place in the House of Commons on the 21st February, 1809, made an observation, to which almost every subsequent court of enquiry has added additional force: "He perfectly agreed with the noble lord (Lord Castlereagh) in the wish that this might be the last court of the kind which should ever assemble. It was not a court before which any officer would wish to be tried."—1 Hansard, xii. 935.

justice, that the opinion, if any be required, should be confined to that particular point; especially if it is to the effect that there is a *prima facie* case against the accused, or it points to the necessity of trial, because the information may be *ex parte*, and must, from its nature, be inconclusive.

335. Although an officer cannot refuse to obey an order directing him to appear before a court of enquiry, charged to enquire into his conduct, yet he may object to take any part in the proceedings, and has a right to decline answering any questions or making any statement which may, in his opinion, be prejudicial to him in the course of any ulterior proceedings. This was most clearly laid down in the general order promulgating the sentence of a court martial on Assistant Surgeon Walsh, of the Royals, who was tried in 1809, on six charges, and most honourably acquitted of all. The third was for disobedience of orders, in refusing to attend in the mess room of the Royals, having been ordered to do so by his commanding officer, for the purpose of answering to a charge of having broken his arrest. "With regard to the third charge, His Majesty was pleased to remark, that although the opinion of the court might be acquiesced in, yet it appeared that the prisoner was not free from all imputation of blame, for the conduct upon which that charge was founded, inasmuch as it was the duty of Assistant Surgeon Walsh to have obeyed the order of his superior officer, Colonel Hay, as far as that order required his attendance before the court of enquiry, as the compliance with it would not (as the prisoner had erroneously conceived) have precluded him from the right of declining to answer any questions, or to make any statement, which might, in his opinion, have proved prejudicial to him in the course of any ulterior enquiry into his conduct." (7) It is a characteristic of all British jurisprudence, that the accused shall be protected from answering any questions which may tend to criminate himself. (8)

An officer cannot refuse to attend a court of enquiry, but may decline to answer questions, or to take part in the proceedings,

it being a principle of military no less than civil justice that no man is bound to criminate himself;

(7) G.O. 3rd July, 1809.

(8) The above stands as in earlier editions. In remarking upon a later case, where the matter enquired into was such as to subject the officer, who was implicated, to a criminal prosecu-

tion, the then judge advocate general observed, that "he ought to add that . . . should not have been subjected to an examination before the court of enquiry; so far from it, that even if he desired he should have been

and this equally applies to the production of books of accounts, or other documents;

336. The same principle applies to the production of papers before a court of enquiry. This was most fully established by the "Simla Court Martial." (9) Captain Jervis was charged with having "neglected to obey the order of his Excellency the Commander in Chief to produce before a military court of enquiry" certain documents which were described as "essential to the clearance of his character as an officer and a gentleman;"—and he was acquitted of this (the second) charge. The field marshal commanding in chief referred the case to the judge advocate general, and his Royal Highness communicated his opinion to the commander in chief in India (Sir William Mansfield) in a despatch, which, from an animated debate in the House of Commons, (10) appears to have been considered and sanctioned by the secretary of state for war and the president of the council for India. The judge advocate general (Mr. Mowbray) was of opinion that such an order was "not a lawful order, upon the principle which is fully recognized, in the administration of military as well as civil justice, that a man is not bound to criminate himself, whatever be the nature of the charge." He then used the first half-dozen lines of the last preceding paragraph of this work, [§ 335] as expressing "the custom of the service;" and adds, "This rule would clearly entitle Captain Jervis, in law, to decline producing any documents, although ordered or requested to do so." Mr. Mowbray further gave his opinion:—"The production of the books before the court of enquiry was not, as stated in the charge, essential to the clearance of his character as an officer and a gentleman, for Captain Jervis was entitled in law to reserve his defence for a court martial. But in saying this I must not be understood to mean that I approve of his conduct in availing himself of that strict legal right." The despatch proceeds:—"So fully does his Royal

which may be reserved for the defence before a court martial,

cautioned that what he then said might have been given in evidence * against him, which caution should have been recorded on the proceedings."—*Ed.* 1852.

to an address of the House of Commons, 2nd July, 1867, ordered to be printed 22nd July, 1867.

(10) 6th August, 1867.—3 Hansard,

(9) Copy of proceedings in return clxxxix. 1015, 1028.

* It may be remarked that this refers to the criminal prosecution. See hereafter [§ 1001] a very decided opinion as to the injustice of receiving against a prisoner before a court martial evidence of anything said or urged in the course of the proceedings of a court of enquiry.

Highness concur in this latter view, that he cannot bring himself to understand why Captain Jervis, if he were strong in the conviction of his own integrity, did not voluntarily produce the books in question." (1)

but there are cases where an officer ought not to avail himself of his legal right.

337. Courts of enquiry, as a general rule, sit with closed doors. It is said that the accused, or the person concerned in the result of the enquiry, has no positive right to be present at an investigation, by a court of enquiry, into circumstances affecting his character; but the regret of a court martial (embodied in their judgment), that the prisoner had not been present and heard before a court of enquiry, which had been ordered to investigate the circumstances which led to the charges before the court martial, has been (as part of the opinion) approved by His Majesty; (2) and in the course of a debate in the House of Commons on a naval court of enquiry, it was admitted, on the part of the admiralty, that "a grave error had been committed" in not allowing the accused party to be present, (3) and instructions were issued to prevent any similar case in future. (4) The accused attending the investigation, may either answer any questions put to him, or refuse to answer, as he pleases; may either avail himself of the opportunity to explain any particular act, or any part of his conduct, on which an imputation prejudicial to him may have arisen, if he should think it expedient to do so, after being cautioned that any statement he may make may be made use of against him;—or he may reserve his defence or exculpation, submitting a request for trial by a court martial. The attendance of the accused can scarcely fail to benefit him in the event of trial, as he will have ascertained, to a considerable extent, the substance and nature of the evidence to be brought against him; and any material discrepancy between the testimony of a witness before the court of enquiry and his evidence before a court martial may be employed to impeach his credibility.

Irregular to debar the accused from being present at a court of enquiry,

either military or naval,

338. The accused appearing before a court of enquiry but has no

(1) Military Secretary to Commander in Chief in India. Horse Guards, 17th January, 1867.—Despatch, &c., ordered by House of Commons to be printed, 22nd July, 1867, Para. 6.

(2) G.O. No. 238.

(3) H.C., 19 May, 1863.—3 Hansard, clxx. 1978.

(4) "The party concerned in the result of the enquiry should be present during the whole time that witnesses are being examined. Should he object or refuse to be present, the proceedings would go on in his absence."—Circular (Admiralty), September 8th, 1863, since embodied in Addenda to Naval Regulations (1868), 150.

other established claim.

cannot claim permission to ask any questions, nor to produce any testimony; nor has he any right to insist on the attendance of counsel, and, more than this, it is not usual to permit the presence of a professional adviser in any case before courts of enquiry.

Composition of courts of enquiry.

339. Courts of enquiry, deriving their existence from the will of a superior, and not being regulated by any statute, or any order of the sovereign, excepting that which may issue on a particular enquiry, may consist of any number of officers; three, five, or even two, have been associated on such duty; the rank of the members is also unfixed; it is usually equal, or superior, to that of the officer whose conduct or character may be implicated in the investigation.

President.

The president must in every case be a combatant officer, and no non-combatant officer may be called upon to attend the court as a member, whose relative rank is superior to his. (5)

Procedure.

A court of enquiry, when assembled by order of the sovereign or the commander in chief, has been sometimes attended by a judge advocate, at other times not. It may be either open or close, depending in this, as in every particular of its constitution, on the will of the officer convoking it. The members do not make any declaration of impartiality or of secrecy as to the opinion of themselves or any other member. The statements of persons examined by the court, or whose conduct is the subject of enquiry, are recorded in writing, as at a court martial; and, when required, the opinion of the court collectively, at other times of each individual, is reduced to writing. (6) The proceedings are signed by each member, (7) and are forwarded to the convening authority by the president.

Proceedings reduced to writing, and

signed by each member, by way of attestation.

Appointment

340. It has been laid down, as upon authority, (8) that

(5) R.W.111.

(6) See Proceedings of Board of Enquiry relative to the [Cintra] Convention for the evacuation of Portugal by the French in August, 1808. On this occasion such "members as may be of a different opinion from the majority" were required "to record upon the proceedings their reasons for such dissent." Their reasons were accordingly recorded by General the Earl of Moira, Lieut. General the Earl of Pembroke, and Lieut. General Nicholls in the reverse order of their seniority,

as when the votes are collected at a court martial.—*Proceedings*, 234–238.

(7) This was the ordinary practice, and is now enforced by the Queen's Regulations.—Q.R.S.G., p.68.

(8) James' Tytler, Advertisement, p. xv. It does not appear that this was an opinion given by Sir Charles Morgan, but rather to be one of the several cases growing out of the decisions of recent courts martial which the editor (*see* his Advertisement, p. ix.) subjoined to Sir C. Morgan's observations on the first edition of the work.

“a charge cannot be sent to trial which has retrospect to a period of more than three years (vide mutiny act), but a court of enquiry may be ordered after the lapse of any period.” If this opinion had been to the effect that the power to order a court of enquiry, after the lapse of the period defined by the mutiny act, was confined to the sovereign, no remark would have been offered on the subject. As it is the prerogative of the crown to dismiss officers from the service, without affording them any public opportunity of justifying their conduct, it must undoubtedly, in some sense, be considered a mark of royal favour, that an officer should have extended to him an opportunity, such as a court of enquiry may afford, of exculpating himself from the charges brought against him, and of regaining the royal confidence. But the assumption of such power by any authority, subordinate to the crown, must be unjust and oppressive, if not illegal. The main object of a court of enquiry, ordered by authority less than supreme, is to enable an officer in command to arrive at a correct conclusion, as to the necessity of convening a court martial. Such pretext cannot possibly exist, in any circumstances, where the facts to be enquired into are of a date beyond the retrospection of a court martial. This the mutiny act limits to three years, except in cases of impediment to trial, and then to two years after the impediment shall have ceased. It is not to be presumed or imagined that any motive, but the honour of the army and the benefit of the service, can influence the crown to establish a court of enquiry in any circumstances, or after any period; but it is too true, that other motives may possibly actuate commanding officers, who, in their daily intercourse with the world at large, are brought in contact, and by the usages of society, placed on a footing of equality with the same men, whom, on points of duty and on parade, they are called on to command and to control. The evidence, or rather information, before a court of enquiry may, as already observed, be entirely *ex parte*; at all events, the character of an officer is not protected, however invidious the attack, by the solemnity of an oath; nor, beyond the limits of time for a court martial which are fixed by the mutiny act, can he, under any circumstances, obtain a hearing of his case by any tribunal competent to decide on it. Surely, then, justice

whether
limited as to
time.

forbids investigation by a court of enquiry, which may countenance malicious accusations, of which it cannot pave the way for trial, or may give rise to and foment prejudices, which it cannot allay ; and particularly, as the members who compose the court, if court it can be termed, are so limited in number, not subject to challenge, and irresponsible to any superior tribunal for the opinion they may give.

Courts of Enquiry held under Articles of War.

Court of enquiry, for doing justice on the complaint of soldier, as to his pay or clothing,

341. The thirteenth article of war, as altered in 1860, has substituted a regimental court of enquiry for the regimental court martial, which, for more than two hundred years, had been held for the purpose of hearing the complaints, and redressing wrongs of non-commissioned officers and soldiers "in any matter respecting their pay or clothing by the captain or other officer commanding the troop or company." It must however be understood, that in conformity to the custom of the service, the soldier ought first to address himself to his captain, or the officer commanding his troop or company ; and it is only on not receiving at his hands the redress to which he may conceive himself entitled, that he is authorized to apply to the commanding officer of the regiment. It would appear that considerable licence is permitted to the soldier, as, upon his representation, the commanding officer *is required* to summon a regimental court of enquiry, the opinion of which he can obtain without the risk of punishment.

who is protected in seeking redress.

The wrong contemplated arises in the interior management of a company,

342. It is evident, from the wording of the article, that the wrong here intended must resolve itself into some claim not admitted by the officer, or some charge against his pay objected to by the soldier. It would not be competent to a regimental court of enquiry, thus summoned, to enter upon an enquiry as to a charge of tyranny and oppression, or ill-treatment, brought forward against the captain or officer commanding a company, and arising out of the ordinary connection of an officer and a soldier, as from duty in the field or under arms. Such complaints must be preferred in the usual course to superior officers, and, in their discretion, are referred to a court, convened for the trial of the accused, and competent to award punishment on conviction. The regimental court of enquiry is solely for the purpose of

and not out of the more enlarged connection of an officer and soldier,

determining whether the complaint, as to the matters of account contemplated by the article, is just, and the opinion must be confined to the merits of the complaint, and simply state whether or not it is well founded, and to what extent. By an addition to the article of the year 1872, it was provided that no stoppage of pay in respect of barrack damage duly assessed by a court of enquiry, should give any non-commissioned officer or soldier a right of appeal to a general or other court martial.

nor in respect to stoppages for barrack damages.

343. From the award of this court of enquiry either party, the complainant alleging, or the officer charged with doing the wrong, "may, if he thinks himself still aggrieved, appeal to a general court martial, and such court shall hear and determine the merits of the appeal, and after determining the same, and after allowing the appellant to show cause to the contrary by himself and by witnesses, if any, may either confirm the appeal, or dismiss it without more, or may, if it shall think fit, pronounce such appeal groundless and vexatious, and may thereupon sentence such appellant to such punishment as a general court martial is competent to award." The proceedings of general courts martial held on appeal from a regimental court of enquiry are transmitted, as in other cases, to the judge advocate general at home, or to the officer authorized to confirm the sentences of general courts martial abroad; and by the intention, if not by the terms, of the oath taken by the members, they are precluded from divulging the determination of the court, until it has been duly approved.

Either party may appeal

to a general court martial for its determination, which

1, confirms,
2, or simply dismisses the appeal,
3, censures the appellant, or
4, punishes him :

which determination must be confirmed in the usual manner.

344. When the court decides against the appellant, it may (1) add that the appeal did not appear vexatious, and it would seem to be very desirable to do so in all cases of a well-disposed appellant, "who might have entertained an honest but erroneous impression of his case."

Remarks by court.

345. The eighty-second article of war directs that any

(1) Opinion of a general court martial held at the Castle, Cape Town, 23rd February, 1831, confirmed by Lieutenant General Sir G. Lowry Cole:—"The court having maturely considered the evidence and weighed the circumstances brought before it, is of opinion that the charge of ten shillings and sixpence has been justly

debited against the appellant, Private Murdoch Finlayson, of the 72nd Highlanders, and does therefore confirm the award of the regimental court martial, held on the 16th inst., though the court, in passing this opinion, acquits the appellant of having made a vexatious appeal."

Court of enquiry on case of soldier maimed or mutilated.

soldier, whether on or off duty, who shall become maimed, or mutilated, or injured, except by wounds received in action, shall be forthwith brought before a court of enquiry. The court reports their opinion whether such maiming or mutilating or injuring was occasioned by design, and if the court reports that the maiming or mutilating or injuring was not occasioned by design, the soldier is not liable to be called to account in respect thereof. If the court reports their opinion that such maiming or mutilating was occasioned by the designed and wilful act of such soldier, or by any other person at his instigation, with intent on the part of such soldier to render himself unfit for the service, and not by accident, in that case the article requires that he shall be forthwith put upon his trial before a *general*, *district*, or *garrison* court martial on a charge for *disgraceful* conduct.

Proceedings how dealt with.

346. The proceedings of the court of enquiry and of the court martial, when held, are transmitted through the judge advocate general to the commander in chief, and afterwards by the secretary for war to the commissioners of Chelsea Hospital, in order that they may, when the case comes before them, have the best means of arriving at a just decision, either to grant or withhold a pension. (2)

Court to record illegal absence,

empowered to administer an oath.

Record has effect of conviction of desertion in certain cases, and is legal evidence on trial for desertion,

347. The hundred and sixty-seventh article directs that if any soldier shall have been illegally absent from his duty for the space of twenty-one days, a court of enquiry of *three* officers shall forthwith assemble, and empowers them to examine witnesses upon oath respecting the fact of such absence, and the deficiency, if any, in the articles of his kit. Having received proof on oath of the facts, they declare such absence and the period thereof, and the deficiency, if any; and the officer commanding the corps enters a record of such absence, and of the declaration of the court of enquiry thereon, in the regimental books. (3) If such soldier should not afterwards surrender or be apprehended, the record has the legal effect of a conviction for desertion:—and if the soldier should surrender or be apprehended after the record has been so entered, such record, or a copy thereof, purporting to bear

(2) A.W.82.

(3) The regimental court martial book is intended. — Q.R.S.23,p.43.

When a soldier serving abroad deserts, a certified copy of the declaration is to be sent to the depôt.—Q.R.4b.

the signature of the officer having the custody of the regimental books, shall, on the trial of such soldier, be admissible in evidence of the facts therein recorded; [§ 182] and on proof of the identity of the prisoner with the soldier therein mentioned, [§ 184] he may be found guilty of the charge or charges.

or other charges.

348. The Queen's Regulations, (4) as revised in 1859, for the first time directed that with a view to prevent any officer who may have been taken prisoner by his own neglect, or any other unofficerlike conduct, from obtaining any of the advantages laid down in the royal warrant, (5) after his exchange or release, a court of enquiry is, as soon as possible, to be assembled by order of the general officer commanding the forces, to investigate the circumstances under which the capture took place; and, having sifted the facts as far as may be in their power, they are to state their opinion whether his capture is to be attributed to the chance of war to which he was exposed, or whether it occurred from any unofficer-like conduct on his part. The president and members of the court make a prescribed declaration. The proceedings of the court are transmitted by the general officer in command of the forces to the military secretary. (6)

Courts of enquiry on returned prisoners of war.

348*. When a man is unable to produce his medal at the inspection of necessaries, a board, consisting of one captain and two subalterns, inquires into and records the cause of the loss. If it be designedly made away with, the man is tried by court martial. (7)

Court of enquiry on lost medals.

349. The Volunteer Act, 1863, (*sec.* 15) as modified by the "Regulation of the Forces Act, 1871," (8) empowered the Queen to assemble a court of enquiry—where the enquiry has reference to an officer—composed of officers only, and in other cases composed of officers, or volunteers, or both. The commanding officer of a volunteer corps or administrative regiment may assemble courts of enquiry, except with reference to an officer, composed of officers, or volunteers, or both. (9)

Courts of enquiry in volunteer force no longer assembled by lieutenant of county, but by the crown,

or commanding officer of corps.

(4) Q.R.S.4, p.18.

(5) R.W.83.

(6) In the case of a soldier, as required by the eighth section of the Army Service Act, 1847, and the twelfth section of the Army Enlistment Act, 1870, and by the 171st Article of War, due enquiry is made by a court martial upon his rejoining the service.

(7) Q.R.S.21, p.13. A.W.102.

(8) The 34 & 35 Vict. c. 86 (Regulation of Forces Act, 1871), s. 6, provides for revesting in the Crown the jurisdiction and power of lieutenants of counties, and for their exercise by a secretary of state.

(9) See R.V.F. 74-77. The regulations as to courts of enquiry in the volunteer force are framed by the secretary of state for war.

CHAPTER X.

PROCEEDINGS ON COMMISSION OF OFFENCES, SUMMARY
DISPOSAL OF COMPLAINTS.

Ordinary course
of criminal
justice not
to be interfered
with.

350. THE seventeenth article makes provision for the apprehension of officers and soldiers when accused of capital and other crimes punishable by the known laws of the land. This is enforced [§ 165-7] by the ninety-sixth article of war against refusing assistance to the civil magistrate, and by the seventy-sixth section of the mutiny act as to the "punishment of officers obstructing civil justice" on application being duly made to them.

Persons not
serving as
soldiers, nor
surrendering
themselves to
their own
corps, are
not to be
tried for
desertion
unless they are
committed
on that
charge by
the civil
magistrates ;

351. These provisions have the effect of maintaining the supremacy of the ordinary course of law in the case of officers and soldiers, and leave them to be dealt with according to military law in the case of offences declared by, or under the provisions of, the mutiny act. One exception, however, arises when a person not actually serving in the army is suspected of being a deserter, or surrenders himself as such otherwise than to the corps to which he belongs. The mutiny act authorizes a constable, or—"if no constable can be immediately met with"—then any officer or soldier, (1) or other person to apprehend him; but, with constitutional jealousy for the liberty of the subject, will not allow the military authorities to decide as to the civil or the military status of the prisoner, but enacts that he shall be forthwith taken before a magistrate; and the magistrate alone has the power of committing him on a charge of desertion, and only if he is satisfied that there are reasonable grounds for believing that "such suspected person is a deserter." (2) The same section provides, that the

and the same
holds of
officers.

(1) Q.R.S.6, p.74. The 44th Article of War [§ 142] requires officers and soldiers to cause deserters "to be apprehended by the civil power."

(2) M.A.34. In the mutiny act of 1847 and subsequent years "deserter" has replaced "soldier" in this clause. Captain Archibald Douglas, 49th

Madras Native Infantry, was committed as a deserter on the 4th Nov., 1842, and, being brought up by writ of *Habeas Corpus* before the Court of Queen's Bench on the 14th of the same month, was discharged, because it was objected he was not within the 22nd section (corresponding to the present

“person charged with desertion”—as the act in this instance preferably [§ 1014*n*] designates the prisoner—“may either be conveyed in civil custody to his corps, or to the nearest military station, or to a prison or police station, or delivered to a party under a non-commissioned officer.”

Sent in civil custody to regiment, delivered to a non-commissioned officer, or committed to civil prison.

352. The eighteenth article of war directs that “whenever any person subject to the mutiny act shall be charged with committing an offence, he shall, if an officer, be put in arrest, and, if a soldier, be put in confinement, and shall, within a reasonable time, either be brought to trial before a court martial, or be discharged from the said arrest or confinement.” This provision is further enforced by the seventy-fourth article, which renders an officer liable to cashiering who “shall unnecessarily detain any prisoner in confinement without bringing him to trial.” The effect of this article may be ascertained by considering the proof necessary to maintain a charge under it—that the offence charged against the prisoner was of a nature not admitting or justifying a trial, or that the commanding officer was aware of his innocence, and that, *therefore*, the detention was unjust. A commanding officer may act for the advantage of the service, for the furtherance of discipline, and with lenity towards a prisoner guilty of a military offence, by keeping him for a time in suspense as to the ultimate steps to be taken respecting him, and ending by deciding on his release without trial. The provision as to eight days was removed from the articles of war in 1866, but the regulations appear to provide for such cases by permitting confinement, to the extent of *eight and forty* hours, at the discretion of commanding officers. (3)

Arrest and confinement in military custody.

Penalty on unnecessarily prolonging,

and proof required.

Time prolonged to induce reflection.

353. An officer is put in arrest either directly by the officer who orders it; or more generally by the ministration of a staff officer,—an officer of the general staff, when the arrest is directed by a superior officer and not through the channel of the commanding officer;—by the adjutant or a field officer of the regiment, when ordered by the commanding officer. Arrests have occasionally been imposed by the intervention of the provost marshal, and, more rarely, notified

ARREST of an officer.

thirty-fourth), which specified “soldier.”—3 *Q. B. Reports*, 825–831.

(3) “Prisoners are not to be detained in custody for a longer period than *forty-eight* hours—exclusive of Sun-

days—without having their cases enquired into, and either summarily disposed of, or reported to superior authority.”—*Q. R. S. 6, p. 27*.

Form of
imposing.

even in public orders. On being placed in arrest, an officer delivers his sword to the person imposing it. This form was sometimes omitted,(4) but an officer in arrest never wore a sword. The new regulations direct: "When placed in arrest he should be deprived of his sword until released;" and also that "when an officer is placed in arrest by his commanding officer, the circumstances of the case should immediately be brought to the notice of the general commanding." (5)

Report to
general.

Degrees of
arrest;

354. An officer in arrest is to all intents and purposes a prisoner. The arrest may be either close; or at large, if extended by the express permission of the authority who may order it. The Queen's Regulations since 1859 have enforced the established custom of the service: "An officer in close arrest is not allowed to leave his quarters or tent. If he be in arrest at large, he may be permitted by superior authority to take exercise within defined limits, viz. not beyond the barracks, or, if in camp, not beyond the quarter guard, and then only at stated periods; but he is not to appear in his own, or any other mess premises, nor at any place of amusement or public resort, and he is on no pretext to quit his room, or tent, dressed otherwise than in uniform, but without his sash and sword." (5)

on parole,

355. Officers in arrest are ordinarily considered on parole, but when accused of having broken their arrest, or of any heinous offence, the penalty of which might induce a desire to escape from justice, when under close arrest, they have been placed in custody of the provost marshal, or in charge of a sentry. An officer, by being placed in charge of a provost marshal, or by having a guard placed over his quarters, is not thereby freed from the responsibility of arrest; [§363] nor can an officer commanding such guard permit the officer in his charge to leave his place of confinement, under the impression that the security of his prisoner is all that is required of him. (6)

even when in
charge of a
guard.

(4) Captain Jervis was tried on an additional charge, and found guilty, of having refused to deliver his sword when under arrest.—*Simla Court Martial*, 4, 165.

(5) Q.R.S.6.p.53. As to removal of arrest, see § 368.

(6) A.W.73. G.O. (*India*).Sept.30th, 1831, by Lord Dalhousie, on the promulgation and remission of the sentence of

courts martial on Lieutenants Naylor and Williams, of the 8th N.I. Lieut. Naylor was cashiered for breaking his arrest; and Lieutenant Williams was cashiered, for that he, when commanding a guard over a prisoner committed to his charge, did allow such prisoner (Lieut. Naylor), to leave his place of confinement.

356. A court martial has no control over the nature of the arrest of a prisoner, except as regards his personal freedom in court; they cannot, even with a view to facilitate his defence, interfere to cause a close arrest to be enlarged. The officer in command is alone responsible for the discharge of this duty; but the prisoner, subject to such conditions as he may prescribe, has an undoubted right to communicate freely with his witnesses, or a professional adviser, if he desire it, before and during the trial; and if he is in close confinement, suitable arrangements must be made for the purpose.

Court martial cannot control the nature of,

but the prisoner has right to every facility for preparing his defence.

357. A senior officer is liable to arrest by his junior, not only in case of quarrels, frays, and disorders, as is specially provided for by the articles of war, [§ 147] but for any glaring impropriety, as drunkenness on parade. This was very clearly shown by the order on a court martial for the trial of Brevet Lieutenant Colonel Alexander Hog, major in the 55th regiment, "for being drunk on duty when under arms inspecting the guards and picquet of the 55th regiment of foot, at Plymouth, on or about the 9th of October, 1819." The court after the finding and sentence, whereby Lieutenant Colonel Hog was found guilty, and sentenced to be cashiered, proceeds, "The court conceives that it would be a dereliction of duty, were it to pass unnoticed so extraordinary and (as far as the experience of the court extends) unprecedented an occurrence, as that of a commanding officer being put under arrest, while in the actual command of a regimental parade, by a junior officer of the corps. In making this observation, the court does not presume to take upon itself the authority of commenting upon so delicate and highly important a point of military discipline, further than to remark, that the circumstances detailed in evidence upon the proceedings of the court were not, in their nature, of that imperious urgency, as to have called for the immediate adoption of so very strong a measure. And further, that it does not appear to the court that Captain Elligood, or the officers who were called upon by Captain Nicholson to consult upon the subject, were actuated by any spirit of insubordination, private pique, or malice, towards Lieutenant Colonel Hog; but were influenced in their conduct by feelings of zeal for His Majesty's service, and the immediate honour of the regiment." His Royal Highness was pleased to confirm the

A senior officer in certain cases liable to arrest by his junior,

even on parade;
a senior officer
in certain cases
liable to arrest
by his junior,

but previous
consultation
condemned.

CONFINEMENT
of private
soldiers, and
non-commis-
sioned officers.

Non-commis-
sioned officers
confined under
arrest.

Men not to be
kept in irons, as
a matter of
course, in any
instance.

finding and sentence, but permitted Lieutenant Colonel Hog to receive the regulated value of his commission; and was further pleased to command it to be signified, "that though the observations of the court upon the nature of Lieutenant Colonel Hog's arrest are no doubt founded upon the best motives, yet it is impossible to let them go forth to the army without explaining that the court are in error when they suppose that circumstances may not occur, even upon a parade, to justify a junior officer in taking upon himself the strong responsibility of placing his commander in arrest: such a measure must alone rest upon the responsibility of the officer who adopts it, and there are cases wherein the discipline and welfare of the service require that it should be assumed. In the present instance, the sentence of the court appears to afford a full justification of Captain Elligood's conduct in the placing of Lieutenant Colonel Hog in arrest; though it would have been more regular, if that officer had continued to rest upon his own responsibility, without calling a meeting of his brother officers to support it by their opinion."

358. Private soldiers are confined in charge of a guard or sentry except (as was first provided in 1873) in case of minor offences. (7) When non-commissioned officers are confined for any offence, they are placed under arrest, and not sent as prisoners to the guard room except in extreme cases, when it is necessary to ensure their safe custody. (8)

359. Prisoners are not to be kept in irons previous to trial: this measure was at one time frequently, though never universally, resorted to in the army, in cases of men charged with the more heinous offences; but it ought to be avoided, as, unless necessary for the safe custody, or to prevent the violence, of a prisoner, it is in the nature of a punishment on a man, whom the law at such times mercifully presumes to be, or rather treats as being, innocent. (9)

(7) "Soldiers committing minor offences, such as absence from tattoo and other roll-calls, overstaying a pass, or slight irregularities in quarters, should not be lodged in the guard room before their cases are disposed of by the commanding officer. . . . They will not be allowed to quit the barracks until their cases shall have been disposed of. They will attend all parades,

but are not to be detailed for any duty."—Q.R.S.6,p.28.

(8) Q.R.S.6,p.5.

(9) The Queen's Regulations point out that "escorts are answerable for the safety of deserters entrusted to their charge." Also they direct that "all deserters," which is here intended to include men committed on the charge, but not yet convicted, of deser-

360. The nineteenth article prescribes, that "No officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer belonging to the forces; and such officer "shall, at the same time, or without unnecessary delay, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged." It is obvious that this article does not extend to the custody of prisoners who are not subject to the articles of war; but Lord Campbell, then chief justice of the Queen's Bench, in giving judgment in the case of *Wolton v. (Major) Gavin*, in which the majority of the judges concurred, stated his opinion, that the article "embraced both civil and military offences. The 18th," now seventeenth, "article applied to civil crimes, and the 19th," now eighteenth, "to military offences, but the 20th," now nineteenth, "applied to both classes of offences, the word 'crime' being used." (10)

Officer on guard and provost marshal to receive prisoners;

if subject to the articles, and this whether charged with civil or military offences.

361. The provisions in this article are further enforced by the seventy-second and seventy-third articles. The seventy-third declares the penalties to which the commander of a guard is liable for releasing a prisoner without authority, or suffering him to escape. The seventy-second article guards against the undue confinement of soldiers, by requiring a written report to be made of the prisoner's name and crime, within twenty-four hours after his commitment (or, if the guard should be relieved prior to the expiration of twenty-four hours, immediately on the relieving of the guard), to the authority competent to direct what steps may be necessary thereon; that is, to the officer commanding the garrison, if a garrison guard; or to the officer commanding the regiment, if a regimental guard.

Officer confining soldier, to give in a written crime.

The commander or guard must report prisoners.

362. It may be observed, that the nineteenth article enjoins a duty, not only on the officer commanding a guard, or the provost marshal, but also on the officer committing a prisoner to their custody. In the first place, a refusal to receive a prisoner is provided for; in the second, the officer is required to deliver in an account, in writing, of the crime with which the prisoner is charged. It is imagined that the

The want of a proper crime will not justify the release of prisoner.

tion, "are to be handcuffed, and for this purpose the escort is to be provided with handcuffs from the regi-

mental stores."—Q.R. & G. p. 78.

(10) *Sittings in Banco*, 15th Nov. 1850.—18 Q.B. Reports, 70.

parts of the article, or rather the obligations created by it, are distinct. Omitting to deliver in *a crime*, as it is usually termed, will not justify the rejection, much less the release, of a prisoner, or exempt the commander of the guard from liability to the penalties attaching to an infraction of the seventy-third article; though such an idea has prevailed in the army to some extent. It is possible that an officer committing a prisoner to custody, may have grounds whereon to justify or extenuate the omission of the duty attaching to the act of committal. It is sufficient for the commander of the guard, that the prisoner is amenable to military law, and that the person confining him is known and responsible; the immediate presence of an officer confining a prisoner may be required elsewhere, and circumstances may not admit of delay. Indeed, numerous inconveniences, and such as will readily present themselves to the imagination of every military man, must arise to the service, if the reception of a prisoner invariably depended on the delivery, in writing, of an account of his offence. The case perhaps is different, and the same reasoning may not apply, as to retaining a prisoner, without a crime, more than twenty-four hours, or beyond the time when the report of the guard may be delivered, or forwarded, to a superior officer, and the prisoner turned over to a relieving guard; and yet the commander of a guard, instead of taking upon him the responsibility of the release of a prisoner, would act more prudently and more in unison with the custom of the service, if he were specially to report the name of the prisoner, together with that of the officer or non-commissioned officer who confined him, stating that no crime has been received. It would then become the duty of the superior officer to call on the committing officer for explanation;—to order the release of the prisoner;—or to take such steps as may appear expedient.

Breaking arrest,
or escape from
confinement,
how punished.

363. Breaking arrest, in an officer, is punished, on conviction, by cashiering peremptorily. Breaking confinement, in a soldier, is punishable, at the discretion of the court before which the offence may be tried. (1)

The mutiny act
provides for the
apprehension of
deserters,

364. Besides the ordinary modes of securing offenders against military discipline, the mutiny act provides for the

(1) A.W.69.

apprehension by the civil power of persons suspected to be deserters, whether officers or soldiers. [§351*n*] It also enacts, that whenever troops are called out in aid of the civil power, or are stationed in billets, or are on the line of march, the commanding officer may require, by a written order to that effect, the governor or keeper of any prison, lock-up house, or other place of confinement, to receive into his custody any soldier for a period not exceeding seven days. (2)

and confinement in civil custody of soldiers when not in barracks.

365. All complaints should be immediately investigated by competent authority, a court of enquiry [§334] being resorted to in those cases, where the officer in command is unable to undertake the enquiry himself, or is not prepared to come to a determination on his own responsibility. In the case of soldiers the regulations (*S.6,p.9*) require the preliminary investigation to be made in the presence of the officer commanding the troop or company, the adjutant, and the prisoner; and in accordance with the spirit of the order which prohibits keeping a prisoner in confinement for a longer period than forty-eight hours, [§352*n*] it is incumbent on commanding officers, generally speaking, to determine within that period as to the measures to be taken with an offender, that is, whether he shall be reported to superior authority, or, if they have authority to assemble a court with power to try the case, brought to a court martial, or otherwise dealt with in their own discretion.

The case of prisoners or offenders must be enquired into, without delay.

366. The further proceedings in those cases, which are reserved for a court martial, are discussed in the following chapter. When the commanding officer does not resort (3) to a court martial or the civil power, he may, in the case of private soldiers, order such of the authorized minor punishments as he may think fit. The Queen's Regulations lay down with regard to this, that it would be inconsistent

Case of a soldier, how disposed of without trial by commanding officer,

(2) M.A.35. The "Volunteer Act, 1863" (*sec. 22*), provides for the apprehension and custody in a public prison of a non-commissioned officer of the volunteer permanent staff, for whose trial [§5] a court martial is ordered to assemble.

(3) The following extract from a letter received from the judge advocate general (Mr. Mowbray) on the subject of a prisoner's trial by court martial, after receiving an award of summary punishment by his commanding officer, was published for the infor-

mation and guidance of officers commanding corps in the Chatham district, 9th August, 1867:—"It is necessary to fix some period to the power of revoking an award of punishment, with a view to order a trial by court martial; and it has been considered in this office, that when the prisoner, after receiving the summary sentence, has been once removed from the presence of his commanding officer, the sentence becomes final, and the soldier cannot subsequently be brought to trial for the offence in question."

without appeal to a court martial,

except in cases where pay may be interfered with:

with subordination that he should admit of the *right* of option or appeal, except where the soldier has a right to demand a court martial, in cases affecting his pay, [§367] although he may, if he think proper, vindicate the justice of his first order by resorting to the alternative of a court martial. (4) This exception to the regulation, which, as a general rule, is most essential to the maintenance of discipline and upholding the authority of the commanding officer, arises from the general principle of not touching the soldier's pay without giving him an appeal to a court martial, in which those who have had to do with soldiers, and know their feeling on this point, will not fail to recognize a wise and practical discrimination.

in the case of a soldier, objecting to summary awards under the articles of war ;

but if such appeal be made in an insubordinate manner, the insubordination may be charged against him ; in the case of a summary order to make pecuniary reparation for misconduct in billets.

367. The fiftieth article of war provides that a soldier "ordered by his commanding officer to suffer imprisonment" (necessarily involving a forfeiture of pay during its continuance) "or deprivation of pay (except in certain cases of fines for drunkenness [§ 212*n*] where the offence is not denied), shall, if he so request, have a right to be tried by a court martial for his offence, instead of submitting to such imprisonment or deprivation." (5) If the prisoner should claim his right to a court martial in an insubordinate or disrespectful manner, such conduct may form the subject of a further charge in addition to that for which the punishment appealed against was ordered. The eighth article of war, which requires that a commanding officer, upon proof of the misconduct of any officer or soldier in billets, should cause reparation to be made either by bringing the offender to a court martial or stopping half his pay, until reparation be made, provides that "if the officer or soldier shall protest against such summary proceeding of his commanding officer, the matter shall be enquired into, and, if necessary, tried before a competent court martial."

An officer, if released from arrest, has necessarily no right to insist on trial,

368. The Queen's Regulations point out, that "an officer who may be placed in arrest, has no right to demand a court martial upon himself, or to persist in considering himself under the restraint of such arrest, or to refuse to return to

(4) Q.R.S.6.p.26.

(5) The revised good conduct regulations, War Office, 10th Sept. 1860, did not, and the existing warrant does not, give an appeal to the soldier denying the commission of an offence, the

punishment for which, other than imprisonment or deprivation of pay, constitutes him a regimental defaulter, and thereby affects his claim for good conduct pay.

the exercise of his duty, after he shall have been released by proper authority." They further declare: "It by no means follows that an officer, considering himself to have been wrongfully put in arrest, or otherwise aggrieved, is without remedy: a complaint is afterwards open to him, if preferred in a proper manner, and provision for that purpose is made by the articles of war." (6) This regulation is taken from an order of His Royal Highness the Duke of York, dated 1st February, 1804, in which it is also stated, that an officer cannot "insist upon a trial, unless a charge is preferred against him." The authority competent to direct the release of an officer must be the officer who imposed the arrest, or the superior to whom it may have been officially reported. It is imagined, that an officer could not, in any circumstances, persist in considering himself under the restraint of an arrest, when released therefrom by the superior officer who imposed it; nor could he decline to return to the exercise of his duty; but he may remonstrate, and the custom of the service, supported as it is by the above-quoted order of his late Royal Highness, the Duke of York, would certainly justify the supposition that *charges having been exhibited* against an officer, he could not, on representation to the proper authority, be refused a trial by a court martial, or such an explanation as might be satisfactory to his feelings. The resort to a trial in these circumstances would be an obvious exception to the rule ordinarily acted on, that courts martial may not enter upon charges which have been extra-judicially disposed of already. (7)

unless a charge
has been
preferred.

Who may
remove an
arrest.

Improper to
prefer charges
previously
disposed of
summarily.

369. The twelfth article of war, quoted above, runs thus: "If an officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding in chief of our forces, in order to obtain justice, who is hereby required to examine into such complaint; and, either by himself, or by our secretary of state for war, to make his report to us thereupon, in order to receive our further directions." (8) The words "*not receive the redress to which he may consider himself to be entitled,*" have replaced the

Redress of
wrongs,
of an officer.

(6) Q.R.8.6,p.53.

(7) See case of Captain Halliday,
§ 562.

(8) The mutiny act (M.A.100) contains a similar provision as to the officers of the Indian forces.

Redress of
wrongs,
of an officer.

words "*be refused to be redressed*;" and the alteration removes the possibility of doubt as to the right accorded to an officer of complaining to the general commanding in chief, on not receiving *satisfactory* redress. Before this emendation of the article, it was conceived that neglect of an application for redress amounted to a virtual refusal, but the degree of neglect justifying a direct address to the general in command being undefined, an officer seeking redress was exposed to the inconvenience which might have arisen from a difference of opinion on the subject.

Superior officer
has no positive
power to dispose
of complaint.

370. It appears that the general officer commanding in chief has no power authoritatively to dispose of the complaint of an officer who may think himself wronged by a commanding officer, but is required to examine into such complaint, and to make his report, either directly or through the secretary of state for war, to the Queen for her "further directions." Successive sovereigns, thus reserving to themselves the right of judging on such questions as may affect the feelings of their officers, have secured to them that consideration to which as the bearers of their commission, they are entitled, and have fostered that refined and gentleman-like feeling for which, amongst the armies of Europe, they are distinguished. It is not, however, to be imagined that a general officer is required, in all circumstances, and without expressing his view of the case, to convey to the throne the complaints of an officer against his superior; even the expression of an opinion, by the intermediate general officer, after due enquiry, is, in most cases, sufficient to render such proceeding unnecessary. The case must be peculiar which would exempt an officer from the imputation of pertinacity, who persisted in the furtherance of an appeal in opposition or disregard to the opinion of the commander in chief. The consciousness in an officer, that he possesses the right of requiring his complaint to be laid at the foot of the throne, may of itself tend to mollify his real or imaginary wrongs, and render him satisfied with minor redress or explanation.

Channel to be
observed in
preferring a
complaint.

371. It is the custom of the service to forward every complaint through the officer commanding the regiment; nor would an officer be justified in deviating from this course, unless the commanding officer should refuse, or unreasonably

delay, to forward it. An officer, on addressing himself directly to the general in command, should apprize his commanding officer of the same, and must obviously observe in the channel of approach to the commander in chief each gradation which may lead to him, as the general of brigade or division.

372. The redress of wrongs in a soldier, arising out of the relative connection between a soldier and the commanding officer of his company, is noticed when speaking of regimental courts of enquiry. [§341] The mode of preferring a complaint is well set forth in the form of a soldier's personal account book, which was first issued by Lord Hardinge when secretary at war. It can never be too strongly inculcated, that personal complaints only, in the army, are admissible; that the combined complaint of several must be considered factious, and is, in its nature, mutinous; that no complaint can be legitimately preferred to a superior officer, without observing the regular channel of access to him; and that if the person complained against be a link in the chain of approach to the higher authority, he is equally to be resorted to as the channel of communication. If he refuse, or unnecessarily delay, to forward the complaint, or to repair the injury satisfactorily, the more direct path then becomes open to the complainant; but he would act prudently, and do well, to make the intermediate authority acquainted with the adopted measure.

Redress of wrongs, of a soldier.

Prescribed mode of preferring a complaint.

373-9. There are periodical exceptions to this long established channel for the redress of wrongs of non-commissioned officers and soldiers upon occasion of the question which general officers, at their yearly inspections, are required to put to regiments, as to whether there are any complaints. It might appear better to accord with the original intention of this question, if the complaints thus brought to the notice of the supreme authority were confined to any *claims* which soldiers may have to make, rather than to extend it to *wrongs* of a personal nature; and it might be argued, and fairly too, that a soldier has no wrong to redress until he has sought satisfaction in the prescribed channel;—still it must be admitted, that this is not the customary interpretation placed on the order; it is usually received (9) in

Exception at the annual inspection, which affords

an opportunity of bringing grievances to notice,

(9) From the year 1868, the expressly recognized the bringing of Queen's Regulations (S.5,r.36) have "grievances" as well as "claims" to

and to refer both to ac-
tars most desirable on
should be put upon the
exercised indeed, but still
except in the case of an
a pretext for insubordi-
sonal slander.

pose, as well as of putting the
hed question—*any complaints?*
he men on parade, often with a
umoured remark, that if there
y old grudge, now was the time
out with it” and “have done

Col. Page
The Hon. Secy of War
Washington D.C.
Dear Sir: I have the honor to acknowledge the receipt of your letter of the 17th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Yours, etc.,
J. M. Smith

CHAPTER XI.

PRELIMINARIES TO TRIAL BY COURTS MARTIAL.

380. THE necessity of resorting to a court martial ought never to be decided upon without the nature of the charge having been first made known to the accused, either by a formal communication, or by his having been present at a preliminary investigation [§ 365], so that in every case an opportunity may be afforded him of denying or explaining the charge. When the complaint against an officer or soldier does not admit of explanation, and it is not summarily disposed of, commanding officers of regiments or detachments submit an application to the superior officer, [§ 384] or, in the case of a soldier, of their own authority assemble regimental or detachment courts martial, when the offence is within the cognizance of this description of court, and does not appear to require more serious notice. An article of war [§ 265] prohibits their giving in vague and indefinite charges against a soldier, and thus trying grave offences before a court of inferior jurisdiction, and commissioned officers can in no case be tried by any minor court martial. In the case of an offence, cognizable, either by a general court martial, or by a district or garrison court martial, the authorities, specially empowered to convene these courts martial respectively, can alone assemble a court for the trial of an offender, or, in the exercise of their own discretion, give permission [§ 263-8] for his being tried by a district or garrison court martial, or by a regimental court martial, as the case may be.

Steps to be taken when there is a *prima facie* case against the prisoner, and it appears to require a court martial.

regimental,
district,
or general.

The charges must not be indefinite,

must be investigated by a competent court,

381. Commanding officers should be guided in their decision as to the necessity of a court martial, by the character of the individual, his conduct, the nature and degree of the offence, its prevalence at the time, and also by the probability of conviction: and they should be careful to avoid preferring charges against officers and soldiers in those cases

not preferred unnecessarily,

and very
great lati-
tude is
allowed.

the most unrestricted sense, and held to refer both to accounts and discipline; and it appears most desirable on every account that no restriction should be put upon the exercise of this privilege, rarely exercised indeed, but still most highly prized by the soldiers, except in the case of an attempt to abuse it, by making it a pretext for insubordinate language, or the vehicle for personal slander.

the notice of the inspecting general. It will be observed that they specify officers as well as soldiers; and with reference to this it may be permitted to the editor to mention, that the late General Sir Thomas Brotherton, when he was attached to his staff, was in the habit of seeing the officers for

this purpose, as well as of putting the established question—*any complaints?*—to the men on parade, often with a good-humoured remark, that if there was any old grudge, now was the time to be “out with it” and “have done with it.”

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not preferred unnecessarily,

nor for offences which might have been disposed of summarily.

Charges must be neither groundless,

nor delayed.

The superior officer has a discretionary power,

except in the case of a soldier, becoming mutilated with intent to unfit himself for the service.

Circumstances investigated by superior authority,

before court martial ordered,

and the charges examined to ensure their being in a shape proper to be investigated.

FRAMING THE CHARGES.

which they might have dealt with on their own authority without having recourse to a court martial. (1)

382. It must ever be right to consider that "to prefer accusations which cannot be maintained, at the same time that the practice is highly inconvenient and injurious to the service, reflects much disgrace upon those who bring them forward." (2) It has also been pointed out that an officer has failed in his most essential duty to the service, by *delaying* to bring forward charges, and that permitting charges to lie dormant, justifies the impression that the prosecutor is not actuated by public motives alone, in their institution. (3)

383. The only case, in which under the existing articles of war a discretionary power to dispense with the trial is not lodged in the officer, whose duty it is to order a court martial, is when a court of enquiry reports that the maiming or mutilation of a soldier was occasioned with intent, on his part, to render him unfit for the service; and the eighty-second article thereupon peremptorily directs that he "shall be forthwith put upon his trial before a general, district, or garrison court martial on a charge for disgraceful conduct."

384. All charges preferred against an officer or soldier, and the circumstances on which the charges are founded, are to be examined by superior authority (4) in order to its being ascertained that the evidence is sufficient to justify the arraignment of the accused; but the officer making the investigation "should be careful to avoid any expression of opinion as to the guilt or innocence of the prisoner." (5)

385. It is not to be supposed that the crime given in when soldiers are confined, or charges against officers, drawn up by those who may prefer them, are to go in that state to trial; but they may be framed and altered in such way as the officer, who is to order the trial, may think best, both in regard to the substance and in other respects. (6)

386. The charge is the formal statement of the crime of

(1) See § 399 for extract from the Duke of Wellington's instructions, dated Horse Guards, 23rd April, 1847.

(2) G. O. Horse Guards, 7th May, 1801.

(3) G. O. Horse Guards, 12th March, 1813. See Q.R.S.6, p. 52, where the last-quoted order is still retained in less outspoken terms.

(4) See special provision as to

schoolmasters, § 65n. As to boards of enquiry in the case of lost medals, § 348*.

(5) Q.R.S.6, p. 49. A printed form, which includes a summary of evidence, is established for applications for general, district, or garrison courts martial on soldiers.—W.O. Form 733.

(6) Sir Charles Morgan. James's Tytler, Advertisement, page xiv.

which a prisoner is accused; and the authority, by whose order the court martial is convened, is responsible for the form in which it is laid before the court. The judge advocate general on the trial of Colonel Quentin very clearly pointed out the general principle which is applicable to the subject of framing charges: "It is well known by everybody, that in the case of charges brought before a court martial, they are not bound to the technical formalities which prevail in other courts of law; but there is this essential principle in every charge, before any court that can exist in the civilized world, that the charge should be sufficiently specific to enable the person to know what he is to answer, and to enable the court to know what they are called to enquire into." (7) Some few observations, therefore, as to framing of charges, may not be misplaced; for though it is neither necessary, nor even desirable, to copy from the technical formality of courts of law, yet, where the observance of certain rules is essential to enable a prisoner to grapple with the charge, they become inseparable from justice, and ought on no account to be disregarded.

Charge defined.

General principle to be observed in drawing up charges, and

387. An appendix to the Queen's Regulations, first added in 1866, contains forms of charges and notes, applicable to the greater number of crimes. The rule is laid down: "In framing charges, care is to be taken to render them specific, in names, dates, and places. In charges against non-commissioned officers or soldiers, the prisoner's regimental number is to be inserted, (8) but all non-essential minutiae are to be avoided. Where a prisoner is charged with any loss or damage of articles of kit, necessaries, arms, clothing, &c., the prices of which are fixed by regulation, the value of such loss or damage shall not appear in the charge. In all other cases the value shall appear in the charge and be proved in evidence." (1)

authoritative examples.

Charges must be specific.

If soldier, number of regiment to be added; and other minutiae required by regulation.

388. Names of prisoners should be at full length, and the regiment, or staff employ or department correctly stated. (2)

NAMES of prisoner; and

(7) Printed Trial, p. 81.

(8) An acting bombardier or lance-corporal is "arraigned as a gunner, driver, sapper, or private, as the case may be, with the acting rank also designated thus: No. — Gunner (Acting Bombardier) A.B.; No. — Private (Lance-Corporal) C.D., and so on. The loss of acting rank should not

form part of the sentence of the court."—Q.R.App.A, 19.

(1) Q.R.App.A, 3. As to great coats, *ib.*; Medals, Q.R.S.21, p.13. See § 229.

(2) No part of an indictment, except where a *fac-simile* is set out, can be in figures: this rule has been recommended to be observed in framing

special addition
in India.

In the case of an officer or soldier or camp follower in India, tried upon a criminal charge, it is usual to insert "then and there serving at a distance of upwards of one hundred and twenty miles from the presidency;" [§ 33] but the proceedings would not be vitiated by omitting the words if the fact were so, as it would be within the official knowledge of the confirming authority.

Names if mis-
stated, do not
give rise to
a dilatory plea.

389. Pleas in abatement were never of any avail with courts martial for purposes of delay: it was always in the power of the court to permit the prosecutor to amend the charge, according to what the prisoner might aver to be his true name, or addition. This custom corresponds with the rule of criminal courts under a provision by an act of parliament. (3)

Prisoner may be
charged under
an *alias*:

390. In corroboration of this custom, attributed to courts martial, the following opinion of judge advocate general, Sir Robert Grant, may be quoted: "Where the identity of a prisoner fully and indisputably appears, it is quite immaterial whether he is tried by his real name or by a fictitious name, or by both names under an *alias*. If the circumstances of his having been known by different names have arisen from mere mistake or from accident, yet the law will not permit such mistakes or accidents to defeat the ends of justice. But if he has designedly assumed a false name for a sinister purpose, then the maxim applies, that no man, whether in a criminal proceeding or elsewhere, shall be allowed to avail himself of his own wrong." Before civil courts, if the name of the prisoner is unknown and he refuses to disclose it, he may be indicted as a person whose name is unknown, if his identity be fully ascertained; and this rule may be applicable by courts martial abroad, or during a proclamation of martial law.

or a prisoner
may be
arraigned

as a person
unknown.

Name of person
in respect to
whom the
offence com-
mitted.

391. Where offences are committed against or in respect of an individual, the same care must be observed in stating the name, if the person be known. If the person is not known, it must be so stated. It is no objection that the

charges, and to the extent of dates being in words, not figures, has, at different times, been enforced by standing orders in local commands; but there is no general regulation to the effect.

In writing the sentence, it is customary to employ words at length for

the number of days' imprisonment, years of penal servitude, &c. It was usual to add figures in the margin, and it is now directed (Q.R.App. B(9)), that "the sentence is to be marginally noted in every case."

(3) 7 Geo. 4, c. 64, s. 19. See § 551, 846.

name is not the real name, if it be that by which the person is usually known, or that it is a name of office or other descriptive appellation, instead of the proper name.

392. Property stolen out of the possession of a person to whom it had been entrusted may be described as stolen *from* that person; just as at common law property may be laid to be the goods and chattels either of the real owner or of the person to whom they had been entrusted. This rule often applies before courts martial, as in the case of money stolen from a pay-master or pay-sergeant, and in many other instances which it is unnecessary to particularize. [§ 1166]

Property stolen is in law the property of the person in actual possession.

393. It is a rule at common law that property belonging to a body of persons cannot be laid in an indictment as the property of that body, unless it be incorporated, but the name of one at least of those must be mentioned, who constitute the body, as in the case of partners, trustees, or joint stock companies. No rule of this kind is regarded by courts martial; and, it may be observed, that the offences of "stealing the property of a military or regimental mess or band" are expressly mentioned in the articles of war.

Party injured sufficiently described by name used in common parlance.

394. The hour, as formerly pointed out by the regulation, should be inserted in the charge only when it is necessary for the prisoner's defence, as, for instance, when charged with being asleep on, or quitting his post, (4) but charges should always set forth the day or days of the month and year on which (or between which, if the offences were of a continuous character) the offences were committed. Or if the offence were one of omission, and the offence consisted in omitting to do an act at a particular time or place, then the charge should state that it was not done at that time and place. If the offence be done in the night, before midnight, it is understood to be done in the day before; and if it happened after midnight, then in the day after. *At or about* a certain hour, and *on or about* are frequently used; but no precise length of time is comprised in these terms. A degree of latitude depending on the nature of the offence is, in certain cases, [§ 850-4] necessarily allowed, without reference to the use or omission of any modifying words, and particularly where the time of committing the act charged is not the

DATES.

Specification of time.

(4) See Q.R.App.C, Charges 16, 17.

The charge must specify the words and acts which are alleged against the prisoner.

Charges must be clear and simple,

the same act not charged under two counts,

but a charge must not be in the disjunctive ; but there may be alternative charges.

In case of stolen goods,

or deficient kit,

essence of the offence, and there is no question as to the expiration of the time limited [§ 52] for preferring the charge, or as to the commission of the act, after the law making it penal had come into operation. The Queen's Regulations point out that, in the cases of insubordinate language, it is "essential that the precise language used should be specified in the charge, and if accompanied by gesture the same should be accurately described." (5)

395. "Charges should not be split and expanded, and the same act should not be charged under two counts, the object being to render charges before courts martial, clear and simple, comprehensible alike by the court and prisoner, without legal assistance to explain terms and technicalities."

396. At common law it is not unusual to insert two or more counts in an indictment describing the same transaction in different ways, but there is no occasion to resort to this practice in framing charges before courts martial. If the evidence does not support the more grave part of a charge, a court martial may convict an offender in any degree in which he may have been proved guilty, finding an attempt, where the commission of an offence has been charged, and the evidence only bears out a conviction for the attempt—or, for example—finding absence without leave when desertion has been charged, and so forth. But it is irregular to frame a charge in the disjunctive so as to include averments of distinct offences. Thus it is directed in the regulations that, in a case of stealing or feloniously receiving stolen goods, charges for the several offences are to be used. (6) The course pointed out by Mr. Mowbray, with reference to this particular case, [§ 223] obviously applies to all. So, too, as to charges under the hundred and second article for losing by neglect, "*or*" making away with articles of clothing, it is directed that "a separate charge should contain each averment." (7) Nor is this a matter of official punctilio. The not having attended to this rule in a recent case, having been brought under notice in a court of law, was the occasion of a signal miscarriage of justice. In 1867 Assistant Comm. Store-

(5) Q.R.App.C.9, *note*. See § 409. establishes a particular offence. —
 (6) Q.R.App.C.29. See § 1202. It J.A.G. June 27, 1872.
 is not necessary to prefer alternative (7) Q.R.App.C.33.]
 charges when the evidence clearly

keeper Robert Moore having been convicted by court martial, under the seventeenth section of the mutiny act, [§205] on a charge of "fraudulently embezzling or misapplying" was committed to a civil gaol upon the order of the general commanding in Canada. He thereupon petitioned the court of Queen's Bench at Montreal upon *habeas corpus*, and that court adjudged the commitment to be void by reason of the form of charge and finding, and ordered the prisoner to be discharged "because the charge and conviction were in the alternative without any certainty as to any or either of the two charges in the disjunctive, and that this is matter of substance." (1)

or embezzlement,

or other like case, the only safe course is to arraign on separate charges.

397. But no more charges ought to be preferred against a prisoner than will bring the act or acts of misconduct, about to be tried, clearly under the review of the court martial. The regulations point out, that if insubordinate language accompany an act or acts of violence, "it should not form the subject of a separate charge, but be stated as a circumstance in the charge alleging the violence." (2) To give another example, a soldier need not be tried on two charges; *first*, For absence without leave from tattoo; and *secondly*, For insubordinate conduct in resisting the regimental picquet and striking the corporal in charge of it; but might preferably be arraigned on one charge, For insubordinate conduct in resisting the regimental picquet sent in search of him after tattoo beating, and striking the corporal, his superior officer, in the execution of his office. "The absence without leave (out of which the violence originated) might," as was remarked by his grace the late Duke of Wellington on a case of this nature being brought under his notice in a return of courts martial, "have properly merged in the graver offence," and in that shape have come under the cognizance of the general court martial—or of a minor court, if specially authorized in the particular case.

A charge arising out of one transaction is not to be unnecessarily split and expanded,

by separate charges, or

by the addition of a charge for a minor offence;

398. The Duke upon another occasion, where an officer, having been brought to trial upon charge of "appearing at mess in a state of intoxication and also improperly dressed," was found guilty only of "having appeared improperly dressed," observed upon the "loose manner" in which the charges were drawn up, the commanding officer having in-

which might, in the event of an acquittal of the grave offence, unfairly subject the prisoner to consequences injurious to his character.

(1) J.A.G. 21st May, 1867.

(2) Q.R.App.C.9.

cluded in "a very grave charge, an irregularity, which it was within his own legitimate authority to have punished by rebuke and admonition without resorting to a court martial at all."

Principle
laid down
by the Duke of
Wellington ;

399. To prevent the injurious effects which result from such cases his grace "expressly enjoined, that where commanding officers may think it necessary to bring officers and soldiers to a court martial on charges of a serious nature, they should as much as possible avoid including in them any offence which the commanding officer would in the ordinary exercise of his discretion punish on his own authority without the intervention of a court martial."

that minor
offences
are not to be
included in a
grave charge.

Simple act of
drunkenness in
a private, when
not subject for
a trial.

400. The seventy-seventh article of war directs that a private soldier shall not be tried, except by a district or garrison court martial, on a charge of drunkenness not on duty. [§ 213] If tried by a regimental court martial for an offence which has been combined with drunkenness, it is summarily dealt with before the trial. (3)

Distinct
offences tried at
the same time,
but not
included in
one charge.

401. The practice of courts martial differs in another respect from that of civil courts, inasmuch as a prisoner may be placed on his trial, at the same time, for several offences of *distinct* natures; but distinct transactions should be specified as distinct instances or in separate charges, and not *blended* in the same charge. This custom of joining several offences does not extend to the joinder of military and civil offences, in those cases where the criminal law is dispensed by a general court martial in default of a court of civil judicature.

Offenders
may be
charged
collectively.

402. Before a court martial, as in a court of civil judicature, several offenders who commit an offence in concert or collectively (4) may be tried together in all cases where the prisoners do not desire one another's evidence, (5) or where for other reasons it may be inexpedient to do so. Thus for mutiny, sedition, riot, destruction or injury of property, and offences of a similar type, two or more prisoners may be joined in one charge (the offences arising out of the same act, design, or omission) and, having been severally arraigned, may be tried together by the same court martial ;

(3) Q.R.S.6.p.59. § 213w.

(4) It was pointed out by a late judge advocate general that drunkenness, simple desertion, or absence without leave, &c., ought not to be

charged as joint offences.

(5) For the course to be pursued by a prisoner, desirous of the evidence of a prisoner implicated in the same charge with himself, see § 918-9.

but the plea, defence, finding, and sentence on each prisoner must be recorded separately. (6) In cases of joint damage, the amount of stoppages to make it good should be distributed among the offenders, according to the part which, in the view of the court, each prisoner may have taken in the transaction.

403. It was at one time usual to state that the crime charged was "in breach of the articles of war," or in breach of some particular article; but the practice had of late years become obsolete. The words "which being in breach of the articles of war" for a military offence, and in like manner the words "which being within the provisions of the article of war" in the case of a civil offence, were also very generally introduced in the wording of the sentence; but they are omitted in the authorized form.

Offence need not be charged in breach of particular article of war,

404. It is, however, necessary that the crime, as laid, should be clearly cognizable under some or other of the articles of war, or some provision of the mutiny act, or other statute having reference to the jurisdiction of courts martial. Where a military offence is not specified in any particular article, it is charged as "conduct to the prejudice of good order and military discipline." (1) No court martial ought to proceed to trial until they have satisfied themselves of their competence to entertain the charge. [§457, 551]

but as described in the charge, must be cognizable by some.

405. Where there is a special punishment for an offence, it is irregular not to follow the article, and it is indispensably necessary that the charge should set forth, in some shape or another, not merely the acts done or omitted to be done, but also every fact and circumstance necessary to constitute the offence.

Article or clause followed when a special punishment.

406. This principle may perhaps be best illustrated by cases which have actually arisen under the article, [§173] which authorizes the punishment of death for the offence of offering "violence against a superior officer being in the execution of his office." In 1809 a soldier named Riley of Captain Thomas Power's company, of the 5th royal veteran battalion, was arraigned "For having on the 6th of January, at the island of Alderney, threatened to take away the life of the said Captain Thomas Power, and for

Case of offering violence to superior,

(6) Q.R.App.A.1.

(1) A.W.105. Q.R.App.C, Charges 34-46.

Article or clause must be followed, to induce a special punishment.

Case where the special punishment could not legally be awarded;

as the punishment was awarded upon an irregularly worded charge.

attempting to do so with a drawn bayonet which he held in his hand;" of which charge the court found the prisoner guilty, and sentenced him to death. The sentence was revised in consequence of a communication from the judge advocate general (Mr. Ryder), who thus expressed himself: "It appears to me that in applying the punishment of death, the court misapprehended the charge against the prisoner, which, as it does not contain any allegation that Captain Power was *in the execution of his office* at the time the prisoner made the attack upon him, does not come within the fifth article of the second section of the articles of war,"—*now the thirty-seventh*—"and is not of a capital nature." (2) It will be observed that this most material circumstance does not appear in any shape whatever in the charge upon which the above opinion was given; but where it can be collected from the charge itself, that the superior officer was in the execution of his office, the wording of the charge, though irregular, would seem to be sufficient in law. An award of the special punishment under the article was sustained no longer ago than 1845, notwithstanding the absence of any formal averment, and after the attention of the highest legal authorities had been pointedly directed to the case. The circumstances were very peculiar: A private soldier had been sentenced by a general court martial at Dublin, to be transported for fourteen years, upon a charge of having "offered violence to" a corporal "his superior officer." The charge set forth details of circumstances of aggravation, fully accounting for the sentence awarded, but did not contain any *express* allegation that the corporal was in the execution of his office; this sentence was confirmed by the Queen, and Her Majesty's pleasure was notified in the ordinary course to one of the Irish judges, who at first objected to take the necessary steps for the transportation of the prisoner. The attorney and solicitor general in England being consulted were of opinion that the charge was sufficient, because they considered that it set forth *facts from which it might be collected* that the corporal was in the execution of his office at the time the violence was offered against him. The case was then brought before the judges in Ireland, and it is believed that they

were unanimous in taking this view of it:—at all events, the judge, who had raised the objection, made the requisite order, and the offender was transported accordingly.

Article must be followed to induce a special punishment.

407. So likewise, a soldier guilty of desertion could not be subjected to any of the punishments *peculiar* to that offence, if charged with absenting himself without leave. And when *intention* enters into the offence, as described in the articles of war, mutiny act, &c., it is as necessary to state the intention in the charge as any other of the facts and circumstances which constitute the offence: and it is always better to use the very expressions adopted by the law to indicate the intention; as “treacherously,” “intentionally,” “wilfully,” “knowingly,” or as the case may be.

In cases of desertion:

or offence depending on the intention.

408. Did not experience point to the necessity of these remarks, they might have been spared, as they may be reduced to the concise axiom: A court cannot go beyond the particular offence charged: A man tried for one crime cannot be found guilty or receive judgment on another. Although military charges are not necessarily framed with the precision which is essential to an indictment, yet, in this particular,—that is, where special and extraordinary punishments such as are not generally applicable to military offences, are in question,—the practice of courts martial comes very near that of civil courts of justice; “an indictment grounded upon an offence, made by act of parliament, must, by express words, bring the offence within the *substantial* description made in the act of parliament; and those circumstances, mentioned in the statute to make up the offence, shall not be supplied by the general conclusion against the form of the statute.”(3) As courts martial professedly discard mere technical formalities, it is, as before observed, the more necessary to distinguish where form is essential to justice; and in this view, if in the practice of courts martial the spirit of the forms of civil courts of judicature can, in any case, be laid hold of without the necessity of adhering to the subtle distinctions made by lawyers, a great point will be gained: and it must be under this restriction that precedents in the practice of civil courts of justice may be sought for, or admitted.

Charges must include all circumstances necessary to constitute the offence.

409. When the charge is for disobedience of any

The words, the subject of

(3) 2 Hale, 170.

charge, must
be specified.

“command,” [§178] the command itself should be set forth ; and the same principle applies when charges refer to threatening, disrespectful, or other insubordinate language. It has been laid down that, (4) “When words are the subject of a charge, they should be set out at length, and after them (to save unimportant variances,) ‘*or words to that effect* ;’ nor should it make any exception to this rule, that they were ever so unseemly, abusive, or insulting.”

Charges
depending on
imputation.

410. There are two offences depending on imputation, on which it may be necessary in this place to offer a few remarks, though they will be again referred to : *scandalous conduct* in an officer, and *disgraceful conduct* in a soldier. Many of the observations, which will be offered, would in a great degree apply on a charge of mutiny, or contempt, or disrespect, to a superior officer ; as, in all these cases, the offence depending on the imputation which may attach to facts, it is necessary that the facts should be specially set forth in the charge.

Scandalous,⁷
infamous
conduct.

Facts to be
stated.

411. The articles of war formerly enjoined, that in every charge preferred against an officer, for behaving in a scandalous manner, such as is unbecoming the character of an officer and a gentleman, the fact or facts whereon the same is grounded should be clearly specified. (5) This provision was very highly lauded by most writers on martial law. Mr. Tytler terms it “a wise and equitable clause ;” (6) it has, however, been omitted ; but it is conceived that its omission ought not to induce a neglect of the principle, inasmuch as abstract justice requires that the accused should be apprized of the matter intended to be brought against him : this truth is so evident, as probably to be the very reason which led to the alteration in the wording of the article. The opinion of His late Majesty George III. on the subject is very fully set forth in an order upon the trial of Ensign James Imlach, 3rd West India regiment, upon a charge of “*ungentlemanlike conduct*.” The prisoner was found guilty of *behaving in an ungentlemanlike manner*, declared by the court to be a breach of the twenty-second article of the sixteenth section of the articles of war (now the seventy-ninth), and sentenced to be dismissed from His Majesty’s service.

Necessity of,
enforced by a
general order.

(4) J.A.G., 3rd April, 1851. See § 394.

(5) Old A.W., sec. xvi., art. 130.

(6) Tytler, 213.

The order proceeds: "His Majesty has commanded me, to point out the *irregularity* of bringing before a court martial, and putting an officer upon his trial, for a vague charge of *ungentlemanlike conduct*, unaccompanied with a designation of the offence, to which that predicament is meant to be applied. And I am further commanded to express His Majesty's surprise, that the court martial should have pursued the like irregular course, finding the defendant guilty *generally* of ungentlemanlike behaviour, and declaring his crime to be in contempt of a special article of war, which has for its object the removal from the service of officers who are convicted of scandalous and *infamous* behaviour, and thereby affixing a most serious imputation upon the prisoner's character, without attending to an express provision contained in the same article of war, which enjoins, that in every charge against an officer for scandalous and unbecoming behaviour, the facts or fact wherein the same is grounded shall be clearly specified."

Vagueness in charge condemned.

412. It appears to be equally necessary, that the facts by which the imputation is to be supported, should be stated on a charge against a non-commissioned officer or soldier, for "disgraceful conduct." There is an exact analogy between the offence of *scandalous* conduct in an officer and *disgraceful* conduct in a soldier; the reasoning which applies in one case, must in the other; and the orders which have, from time to time, appeared respecting the charge for one offence, may appropriately be referred to when considering a charge for the other.

Disgraceful conduct, analogous to scandalous conduct;

413. The following case supports the position, that facts must be set forth to maintain a charge of disgraceful conduct: Private James Macnamara, 81st regiment, was tried in March, 1830, before a garrison court martial, "for disgraceful conduct, he having been repeatedly guilty of offences by which he is deemed unworthy to remain in His Majesty's service:" to which charge the prisoner pleaded "Not guilty; I do not know what crime I am tried for;" the court, however, found him guilty, and without sentencing him to any punishment it was competent to award *recommended* him to be "discharged with ignominy as unfit for His Majesty's service from vice and misconduct." The proceedings were submitted in the ordinary course to Major General Ross,

Facts to be stated.

Facts to be
stated ;

otherwise
charge not
supportable.

Charges may be
altered before
arraignment
of prisoners,

on the suggestion
of the judge
advocate,

or on the repre-
sentation of the
court, but

a charge cannot
be altered after
arraignment,

except to cor-
rect name
or description.

ADDITIONAL
CHARGES.

lieutenant governor of Guernsey, for approval. He conceived that the want of specification in the charge was an error of such importance as to render nugatory the sentence of the court, and caused the proceedings to be transmitted, with his remarks, to the judge advocate general, who entirely concurred with his excellency in thinking the charge so absolutely defective in all legal respects, that it was impossible to confirm a finding of guilt thereupon ; and added, that he considered any revision of the sentence out of the question, as no sentence of punishment could be *properly adjudged* or enforced upon a charge not supportable in law. [§410-13]

414. Though the form and wording of the charge is, in the first place, left to the officer preferring it, yet the officer ordering the court martial may alter or amend it, at any time, *antecedent to arraignment* ; except, that where the charges are embodied in the warrant for holding the court martial, which has happened when it has been issued under the sign manual, they cannot be altered after the warrant is signed. The warrant may however be revoked previous to arraignment, and a fresh one issued with amended charges. An officiating judge advocate ought not to be called upon to give an opinion as to the sufficiency or otherwise of the evidence by which it is proposed to support a charge ; but it is a part of his duty to represent to the officer convening the court martial any error or omission in the charge, and thereby to anticipate or obviate any delay on the assembling of the court. And if the court take exception to a charge, [§457] or allow any objection made by the prosecutor or the prisoner, they may refer it to the authority by whom it was sanctioned ; but the prisoner once arraigned, it is not the custom of courts martial to permit any alteration in the charge, either by the actual prosecutor or judge advocate, except as it may arise out of an objection on the part of the prisoner, analogous to a plea in abatement for a misnomer or wrong addition. [§389]

415. It is competent to the superior authority, not only to revise and alter the original charges after a copy has been furnished to the prisoner, or after the court has been assembled for his trial, but also to prefer additional charges ; and, at any moment previous to the court being sworn, to require it to investigate them, the prisoner necessarily

having due notice of the alterations or additional charges, before being called on to answer to them. But a court martial cannot entertain any additional charge, brought forward *subsequently* to the swearing of the court and the arraignment of the prisoner, either referring to the charges in issue, or to a distinct offence. This rule is not only established by the custom of courts martial, but must result from the terms of the oath administered to each member: "You shall well and truly try and determine, according to the evidence, in the *matter now before you*." The prisoner is unquestionably amenable for any offence, *not being part* of the subject-matter in issue, committed, either (if within the limited time, §52) prior, or subsequent, to the date of arraignment; but such offence must form the subject of a separate charge, and the trial be distinct. A court, if ordered to try the further charge, must pass judgment on the charges to which the prisoner has pleaded, and then, being resworn, proceed, without reference to the former trial, as in ordinary cases.

Additional charge cannot be entertained subsequent to arraignment,

nor additional instance,

but may be proceeded with on a new trial.

416. In the case of general courts martial it had been the custom for the judge advocate to furnish the accused with a copy of the charge; but it was laid down in the regulations of 1873 (*S.6.p.58*) that "Upon any trial by court martial being ordered, the commanding officer of the corps to which the accused belongs or is attached will be held responsible that the accused is furnished, by the adjutant or a commissioned officer, with a copy of the charge or charges preferred against him, at least twenty-four hours before the court is to assemble, unless the exigencies of the service render it impossible. To a soldier who cannot read, the charge is read, and, if necessary, explained by the person who warns him for trial, (7) and a list of all witnesses for the prosecution is at the same time to be given to the prisoner."

The prisoner is furnished with a copy of the charges

and a list of witnesses for the prosecution,

417. This information, so essential to justice, should be furnished as early as possible. It is usual to do so as soon as the

some time before trial.

(7) This was first embodied in the regulations of 1868. It has been found to obviate pretexts for complaints, sometimes made by soldiers when placed on their defence, when the precaution is not neglected of in-

forming them, when they are warned for trial, that the witnesses they require for their defence shall be duly summoned on their making application to that effect.

superior authority has approved of the charges, or immediately after the commanding officer has decided on bringing the offender before a regimental court martial. The prisoner should in like manner be made acquainted with any subsequent alterations or additions to the charge; and it prevents any suggestion of unfairness or surprise when he has reasonable notice of any additional witnesses whom it may be intended to call in the course of the proceedings. (8)

Additional
witnesses.

Prisoner has
copy of charges,

and has notice
of trial, which

must not be too
precipitate;

but extreme
cases justify
a deviation
from this
custom.

418. Though the prisoner cannot plead a variance between the copy and the charge before the court, as a bar to trial; yet the court, in such circumstances, and particularly where the deviation may be material, would probably deem it a sufficient cause for delaying proceedings; as common sense and reason would dictate that the accused should have a knowledge of the accusations brought against him before his trial, and also have adequate time afforded to enable him to meet the charges, by such evidence and reasoning as the case may require, and as he may deem expedient. A court of enquiry has recorded an opinion, "that the method of procedure" of the commanding officer of a regiment "was unduly precipitate," in having brought a soldier to trial only an hour and a half after he had received the notice. (9) His Majesty was pleased to signify his entire concurrence in the observations and opinions contained in this report. It may, however, be remarked, that, in the case referred to, the necessity of immediate example did not appear to exist, the soldier having been twenty-four hours in the guard-room, between the occurrence of the offence and the determination of the officer commanding the regiment to bring him to trial. The provision in the hundred and thirty-seventh article of war, for the trial, by regimental courts martial, of soldiers charged with mutiny or gross insubordination on the line of march, and for carrying the sentence into execution on the spot, affords ample proof that extreme cases may justify a deviation from the otherwise

(8) The court martial commission recommended: "9th, That in general courts martial the list of witnesses, together with the charges, be furnished to a prisoner as matter of right previous to trial, and that he should also have reasonable notice of any addi-

tional witnesses, whom in the course of the proceedings it may be desirable to adduce."—Second Report, 14th May, 1869, page xi.

(9) G.O. No. 508. Court of enquiry on Private Alexander Somerville, 2nd or North British Dragoons.

well-established custom of giving a prisoner notice of his intended trial and of the charges to be preferred against him, previous to arraignment.

419-421. Previous notice of intention to bring forward former convictions is no longer required to be given the prisoner, but he may be furnished with an abstract: and it appears very desirable to adopt this course, when convictions under an *alias* are for the first time to be brought against him.

Abstract of previous convictions sometimes furnished.

422. In the case of a soldier, the list of the witnesses for the prosecution is usually added to the copy of the charge which is furnished to him when he receives notice of trial; at which time also he is asked [§416*n*] what witnesses for the defence he wishes to be warned to attend the court martial.

Existing practice in case of a soldier.

423. On a reference to the judge advocate general's office, an officiating judge advocate was strongly advised not to furnish the prosecutor with a list of witnesses for the defence, a request to that effect being unusual.

The prosecution refused list of prisoner's witnesses.

424. Sir Charles Morgan laid down the rule that it was not requisite for the prisoner to furnish the judge advocate with the names of any other witnesses than those whom he wishes to be officially summoned.

The prisoner not required to furnish complete list.

425. On the assembling of the court, a list of all the witnesses on the part of the prosecution (§422) is ordinarily laid on the table. It is not, however, enjoined, nor will a deviation from this practice prevent the production of any witnesses whose names are not included in the list. (1) On the other hand the prosecutor is not bound to call all the witnesses on the list; but all the witnesses, whose names had been included in the list furnished to the prisoner, ought still to be present, unless notice has been given to the prisoner, because he might have relied on them for his defence. (2)

Usually laid on the table, on assembling.

(1) In criminal proceedings it is the practice to place the names of all witnesses for the prosecution on the back of the indictment, but it does not prevent the prosecution from calling other witnesses. Indeed it is only necessary to put the names of such witnesses on the back of the indictment, as may be sufficient for the grand jury to find

the bill.

(2) At "the Aldershot court martial" the prosecutor called those witnesses who had been summoned for the prosecution, but whom he did not intend to examine in chief, in order to give Colonel Crawley an opportunity of cross-examining them. — *Printed Trial*, Q. 1019, 1020, &c.

Abstract of evidence may be given to the prisoner before trial.

Order directing the assembling of the court,

426. When an abstract of the evidence is prepared, it may be furnished to the prisoner. This was not permitted in Colonel Crawley's case; but it has since become the practice to give the abstract, when the prisoner makes application for it, especially in those cases where he has not been present [§ 365] at the preliminary investigation. (3)

427. Except when general courts martial are convened by special warrant, both general and district or garrison courts are assembled by an order of the officer duly authorized in that behalf, which is issued some time, and, except in case of emergency, not later than on the day preceding the assembly of the court. This order in the usual routine specifies the description of court, the purpose of its assembly, (4) and the name of the president (5) and either fixes the time and place of meeting, and details the number and rank of officers for this duty according to the general roster, [§ 21] or otherwise leaves these details to be arranged by the officer in whose command the court may be directed to assemble. The order generally directs a return of the names and dates of commissions of the members to

(3) See Evidence, Court Martial Commission:—*H.R.H. the Duke of Cambridge*. Q. 4287. Abstracts were given at the Fenian court martial in 1866.—*Mr. Moubray*. Q. 2847. In an admiralty circular of the 10th June, 1871, it is directed, "In order that no person may suffer injustice by pleading guilty to charges without being aware of the contents of the circumstantial letter (*) on which they are founded, the officiating judge advocate, in all cases where such letter is sent to the president, is, previous to the trial, to furnish the prisoner with a copy of it, as well as of the charges.—Signed, Vernon Lushington."

(4) By G. O. dated Simla, 23rd June, 1838, His Excellency the Commander in Chief (Sir H. Pane), considering the practice which occasionally prevailed of mentioning in the order convening the court, the name of the individual to be arraigned, to be objectionable, is pleased to direct its discontinuance, and to direct that in future the order form-

ing the court be framed generally for the trial of such prisoners as may be brought before it.—*Asiatic Journal*, xxvii. 304.

(5) Where a court martial was assembled at a distant out-station and the president was to be furnished by that or another out-station, it had become usual, with the view of preventing the delay and inconvenience arising from an officer, appointed by name, being unable from illness or otherwise to perform the duty, to appoint the president in some such form as the following—"President—A field officer (or as the case may be) who will be named by the officer commanding the troops at——," thus leaving it open to him to name himself, or any other officer. This practice was expressly authorized by an alteration in the 114th article, in 1860, and it now provides that the president of every court martial shall be appointed by the officer convening the court or "under his authority."

* The "circumstantial letter" in the naval service takes the place of the "summary of evidence" in the application for a military court martial, § 384n, "reporting fully and accurately in detail, and in the order of occurrence, the circumstances on which the charges are founded."

be forwarded to the adjutant general, or other staff officer, for the information of the judge advocate or president; and also at the discretion of the convening authority, details one or more "officers in waiting" to provide for casualties or for the case of challenges being allowed. Detachment or regimental orders are in like manner issued for the assembly of detachment and regimental courts martial, and in this last case all the officers to form the court are mentioned by name, equally with the president.

and of officers in waiting,

regimental courts martial.

428. Mr. Tytler has assumed that it is necessary to furnish the prisoner with a correct detail of the members of the court martial; but except in so far as this information may be conveyed by the orders for the assembly of the court, the custom of the service is decidedly opposed to his dictum, though abstractedly there may be much reason and justice in it; for peremptory challenges not being allowed in military courts, every facility should be afforded the prisoner, to enable him to be prepared to show cause, in the event of objecting to any officer detailed as member. The order for a district or general court martial seldom contains more than the name of the president, or, it may be, the names of other officers above the rank of captain, and, for the rest, merely details the number and rank to be furnished by different districts, brigades, corps, or garrisons. The regimental order specifies the names of the officers for this duty, and to this a prisoner, in his own regiment, may have access without any difficulty. The names and dates of commission of all the members are forwarded to the judge advocate of a general court martial, and, when in his power, it is not to be supposed that he would refuse the prisoner a copy, on his making a proper application to that effect; but in the every day practice of the service, the names often cannot be sent in sufficiently early to admit of any fixed rule.

Detail of court,

not usually furnished to the prisoner,

how put in orders.

Detail of court.

429. By an addition to the hundred and sixtieth article in 1868, it was provided that when it appears "to the officer convening a court martial, either before or after the assembling of the court, that it is desirable that the court or some (6) members thereof should have a view of any

Convening officer may order view of place before trial.

(6) The specification of "*some members*" and "*so many as he shall think fit*" guards against vexatious objections, and enables the convening officer to

place in order to their better understanding the evidence that may be given upon the trial, such officer may direct the court, or so many members thereof as he shall think fit, to view such place."

order the members to have a view at different times, or to dispense with it in the case of those who already know the place. It also provides against delay in the case of other officers supplying the place of the members "appointed to serve on the court martial," who have been assembled (A.W.162), but have not taken the oath in consequence of challenge, illness, or other sufficient cause.

It is not to be supposed that this provision can contemplate the deputation of a part of the court for the purpose of a view after the prisoner has been put upon his trial, not only because a distinction seems to be drawn between "the assembling of the court" and "the trial," but because the resort to any such expedient, unless very

jealously guarded by express legislation, might easily lead to irregularities of a similar character to that which has been most justly characterised [§530] as "directly at variance with the practice of courts martial and the principles of justice," and calculated, as in the case referred to, to "render nugatory the sentence of the court martial."

Obviously the court [§523] may be adjourned to the place, at any period of the trial, and any proceedings might properly take place in the presence of the prisoner. It is equally obvious that, in the event of the members only proceeding to a view, it would be their duty to reject any information of the nature of evidence which might be tendered in the absence of the prisoner.

CHAPTER XII.

OF THE COURT AND ITS POWERS, PERSONS BEFORE THE COURT,
THE PROCEEDINGS.

430. At courts martial the president is charged with the duty of conducting the trial, and with the maintenance of proper order; and not so much from his personal rank and seniority, as in virtue of presiding over a court of justice, and thereby exercising the power vested in it, he is called on to repress impropriety of conduct or language on the part of every person present at its proceedings.

The president responsible for the decorum necessary to a court of justice.

431. At courts martial, other than general, the president acts in the place of judge advocate as to administering oaths, advising the court when necessary, transmitting proceedings, and summoning witnesses, when required thereto by the prosecutor or prisoner, but not in all respects; as he can neither interfere with the charge, nor with questions of evidence *out of court*, nor can he give an opinion, except in his judicial capacity, as to the wording and legality of the one, as the judge advocate may still have occasion to do, [§ 414] or as to the arrangement and sufficiency of the other, which, when he was not forbidden to take any part in the prosecution, [§ 472] was often required from the judge advocate. Such interference would be quite incompatible with the office of judge, and is forbidden by the most obvious dictates of justice.

The president performs the duties of judge advocate at general detachment and minor courts martial.

432. The articles of war enjoin the members to behave with decency; and in the case of their using intemperate words, require the president to direct the same to be taken down in writing and reported to the officer ordering the court martial to assemble. (1)

Decent behaviour of members.

433. No reproachful words are to be used to witnesses or prisoner, and the president is responsible that every

Protection of prisoner, witnesses, &c.

(1) A.W.162.

person attending the court is treated with proper respect.

CONTUMPTS.

Treatment of witnesses and prisoner, by persons amenable to military law ;

contempts, when direct, may be summarily disposed of by courts martial :

how noticed,

and under what limitation.

434. The hundred and sixty-first article of war empowers courts martial at their discretion, to punish an officer or soldier using menacing words, signs, or gestures in their presence, or causing any disorder or riot amounting to a disturbance of their proceedings, or committing any other contempt of the court, and this whether before or after the court has been sworn. The contempts thus subjected to a *summary* punishment are such only as are committed in the sight or hearing of the court, and are not dependent on any constructive interpretation of the law. Courts martial have acted on this power in respect to prosecutors, (2) witnesses, prisoners, and persons present in the audience; and there are cases on record where they have done so, without giving the offender an opportunity of offering an excuse in mitigation, but these, to say the least, are not precedents that can be recommended; or they have accepted an apology where the contrition of an offender justified this course, and their authority was sufficiently vindicated by his submission. At other times, charges have been preferred by the court or by direction of the confirming or other superior officer, whose notice had been drawn to the offence, either by a special report, or by the circumstances appearing in the record of the proceedings. (3) But the words of the article, "the said court," are express, and the custom of the service is an authority for the summary award of punishment by *the* court, that is, the same court, (whether a general, or a minor, court martial) whose proceedings may be interrupted. Where the prisoner is the offender, the court records the offence, (4) and proceeds with the original trial, and at its

(2) In 1791 a general court martial sentenced the prosecutor (a surgeon of the 5th European Battalion) "to be suspended from his rank, pay, and allowances in the honourable company's service, for the term of six months."—Hough on Courts Martial (1826); 455.

(3) In July, 1871, a general court martial was held at Woolwich for the trial of Private Williams, of the Rifle Brigade, and sentenced him to two years' imprisonment with hard labour for insubordinate conduct before a

regimental court martial. When asked in the usual manner whether he objected to be tried by any member of the court he violently kicked the table, and exclaimed, "I object to the whole lot of you."

(4) When the case does not call for more serious notice, courts martial are in the habit of placing upon record their opinion as to anything reprehensible in the language or demeanour of any person before the court. The expression of their opinion is thereupon read in open court from the minute in

close, proceeds to award punishment for the contempt. (1) The articles of the year 1872, by the insertion of the words, "or by a court of superior power," provide for more aggravated contempts which a minor court might not have the power of punishing "according to the nature and degree of the offence." (2)

435. The limits within which a court martial is to exercise its discretion, in the case of a military offender, are nowhere pointed out; but it is very certain that no sentence, in respect to the offences declared in the article of war, can exceed that which the court is competent to award for a crime not capital; nor has a court martial the power to proceed to a summary sentence, in respect to any other offences, merely because they may have been committed in its presence, although instances are not wanting where officers have been led into illegalities under some such impression. (3) Minor courts martial may punish summarily, or refer to a court of superior power in the case of contempts by soldiers; but, from their constitution, are not competent to award any punishment to commissioned officers. A regimental or other court martial, however, in such circumstances, may impose an arrest on any officer of whatever rank, though each individual member may be his junior, (4) in order to his being punished by a general court martial.

Amount of punishment not laid down.

Grave offences cannot be summarily punished.

Minor courts martial have no discretionary power of punishment as to officers, but

may impose an arrest.

Power of courts martial in respect to

436. In the case of civilians, the court martial has no power to commit for contempt. It may, however, direct the

the proceedings.—The court is of opinion that the prosecutor's remark is uncalled for and reprehensible.—The court is under the necessity of expressing grave displeasure at the conduct of the prisoner.—The court admonishes the witness, &c.

(1) At a battalion court martial held at Gosport on the 9th of September, 1867, for the trial of Private Fermston, 59th Regiment, the court sentenced the prisoner to 42 days' imprisonment for the offence for which he was tried, and proceeded to award a further sentence of 14 days' solitary confinement for contempt of court, which he had committed by using highly disrespectful language in the presence of the court.

On reference to the judge advocate general's office, the course thus taken by the court was held to be justified

by the 161st article of war.—J.A.G. No. 379, 12th Sept. 1867.

(2) A.W.105.

(3) In the year 1849, a soldier who was being tried before a general court martial in the West Indies, struck his superior officer in the execution of his duty, in the presence of the court. The court did not proceed with the trial of the charge on which he had been arraigned, but sentenced him to transportation for life.

The general officer was informed that this sentence for an offence of which he had been neither arraigned nor tried, was altogether illegal, and Her Majesty, by reason of such illegality, was pleased to extend her gracious pardon to the prisoner.

(4) Court martial on Major Brown. Samuel, 635.

civilians guilty
of contempt.

removal (by force, if necessary) of any person disturbing its proceedings, or require the assistance of a peace officer, in order to his being "taken before the civil magistrate to be punished according to law." This addition to the hundred and sixty-first article as to "a civilian," was made in 1847, and must be taken to point out the only way in which a court martial must protect itself from interruption on the part of persons not subject to the articles of war.

Witnesses
refusing to be
sworn, or to
answer a legal
question,

may be
attached ;

437. All witnesses attending courts martial, (5) who shall refuse to be sworn, or being sworn shall refuse to give evidence, or not produce the documents under their power and control, required to be produced by them, or to answer all such questions as the court may legally demand of them, are liable, upon complaint made, to attachment in the court of Queen's Bench in London or Dublin, or the courts of law elsewhere in Her Majesty's dominions, as laid down by the statute. (6) In these cases courts of record immediately imprison for a contempt of court ; but where courts martial cannot enforce the attendance of civilian witnesses, except by attachment in the civil courts, they cannot proceed in a summary manner. If it were apprehended that the ends of justice were likely to be defeated in any particular case by the obstinacy or perverseness of a witness, it would perhaps be the best course to adjourn the proceedings and to lay a statement of the facts and circumstances of difficulty before competent authority for consideration and advice. An officer or soldier may be ordered into arrest or confinement, when charges may be preferred against him under the hundred and fifth article, for refusing to give evidence without lawful excuse.

or military
witnesses may
be brought to
trial by a
court martial.

Witnesses are
not obliged to
answer all
questions.

438. It may be observed that the liability of a witness to punishment for refusing to answer, does not simply arise from the disrespect which may be imagined to be involved in his declining to be guided by the opinion of the court, though doubtless if the question is shown to have been such as they may *legally* (1) demand, that is, according to the law of evidence, (and on this would turn the decision in all cases,) his pertinacity would then be the essence of the contempt for which punishment would be awarded.

(5) As to summons, *see* § 890.

(6) M.A.13.

(1) The exceptions will be noticed,
§ 930, 964-7.

439. A court martial may either order a witness, who may be subject to *martial* law and be guilty of perjury or prevarication, into arrest, and prefer charges for the offence; or may report his conduct for the information of the authority convening the court. [§ 146, 907]

Perjury or prevarication, how cognisable by a court martial.

440. A court martial is not duly formed and cannot proceed to the hearing of the matter for which it may be assembled until the president and other members have taken the oaths prescribed in the articles of war, (2) or solemn declaration in lieu thereof. [§ 443] The first or jurors' oath, binds them to try and determine according to the evidence; the other refers to their duties as judges, and includes an oath of secresy as to the sentence of the court until approved, and as to the vote and opinion of the particular members. The judge advocate at general courts martial is also required to take an oath of secresy, (3) which, until 1847, did not extend to the sentence of the court, and still allows him to disclose it when necessary in the discharge of his duties. It was further provided by the articles of war of 1873 that the president should administer an oath of secresy (4) to officers in attendance for the purposes of instruction. [§ 12*n*] In 1865 the president of *any* court martial was authorized "to administer an oath to a shorthand writer to take down, according to the best of his power, the evidence to be given before the court." (5) The court, although it may be

POWER TO ADMINISTER OATHS

to the members,

judge advocate,

officers in attendance for instruction, and shorthand writer,

(2) "You shall well and truly try and determine according to the evidence in the matter now before you. So help you God."

a court of justice, or a court martial, in due course of law. So help you God." —A.W.152.

"You shall duly administer justice, according to the rules and articles for the better government of Her Majesty's forces, and according to an act now in force for the punishment of mutiny and desertion, and other crimes therein mentioned, without partiality, favour, or affection, and if any doubt shall arise which is not explained by the said articles or act, according to your conscience, the best of your understanding, and the custom of war in like cases: And you shall not divulge the sentence of the court until it shall be duly approved; neither shall you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof, as a witness, by

(3) "I, A.B., do swear, that I will not, upon any account whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness by a court of justice or a court martial in due course of law; and that I will not, unless it be necessary for the due discharge of any official duties, disclose the sentence of the court until it shall be duly approved. So help me God."—A.W. 152.

(4) "I, A.B., do swear that I will not, under any circumstances whatsoever, disclose the vote or opinion of any member of this court, and that I will not disclose the finding or sentence of the court before the same is duly promulgated."—A.W.152.

(5) M.A.13.

which must
be repeated
on each trial.

Oaths at trials
of marines,

and at excep-
tional trials
when the
ordinary course
of law is
interrupted.

During an
interval of
many years,
courts martial
were not
uniformly
sworn.

A gradual
return to the
system of
swearing all
courts martial.

The oath at
first prescribed
by the
mutiny act,

has been
modified,

and applies
to any
matter, which
can be brought
before a court
martial.

formed of the same officers, must be resworn at the commencement of each separate trial before any proceedings be had thereon. (6)

441. When courts martial are held for the trial of marines, whether they are composed exclusively of officers of the royal marines, or of the army together with officers of the royal marines, the oaths prescribed by the marine mutiny act are to be used. (7) Upon the same principle, and also from the terms of the ordinary oath at statutory courts martial, it is obvious, in the event of the case arising under a proclamation of martial law, that at any council, or commission, court martial so called, or prevotal or other court constituted by "the commander of an army in the field," (A.W.164) and not being held according to the express provisions of the mutiny act and articles of war, [§23, 104, 282] it would be advisable for the authority erecting such exceptional tribunals, to prescribe such form of oath as might be consistent with their actual constitution.

442. Before the revolution of 1688, the articles of war required that members of all courts martial should perform "the duty of judges" (8) under the sanction of an oath; but after it the mutiny acts prescribed only the juror's oath,—the same as that still used, but with the addition of the words, "between our sovereign lord and lady, the King and Queen's Majesties and the prisoner to be tried." It was to be administered at general courts martial, when the offence tried was punishable by death, and either by a justice of the peace, the judge advocate, or his deputy. This oath, as well as that to administer justice, is now required to be taken on all occasions without exception, and it will be observed that the form, as now modified, applies not only to the trial of prisoners, but also to the trial of an appeal or the hearing of any dispute which may be brought before a regimental or other court martial. The oath was not required to be taken by members of regimental courts martial, nor by

(6) A.W.152. Q.R.App.A.1. See § 521.

(7) M.M.A.13. M.A.W.126. A.W. 148.

(8) "Article XLVIII. Such who are judges in a general court martial or regimental court martial . . . shall take an oath for the due administra-

tion of justice according to these articles or (where these articles do not assign a special punishment) according to their consciences, the best of their understandings, and the custom of war in like cases."—Rules and Articles (by King James the Second), 1688.

witnesses before them, before the year 1805, although the subject had been brought to the consideration of parliament in 1753, by the Earl of Egmont, who then proposed a clause to that effect.

443. All courts martial have power and authority, and are *required* by the mutiny act, and articles of war, (1) to administer an oath to every witness or other person who may be examined in any matter relating to any proceeding before them other than to those who are by law empowered to make a solemn affirmation; [§ 452] but the power of administering an oath does not apply to the examination of any persons before the court is itself sworn. It will be observed that this exception does not apply to members of the court, (2) or the officiating judge advocate. Cases of officers objecting to be sworn had arisen on several occasions within the last few years, as was remarked in the last edition of this work; but an alteration was made in the mutiny act and articles of war of the year 1874, which is evidently intended to sanction the substitution of an affirmation in the case of all persons, whether members, judge advocates, or officers attending for instruction, equally with those summoned as witnesses, who alone had previously been specified. (3)

All courts martial have authority to receive evidence on oath,

or solemn affirmation;

and to dispense with an oath in all other cases.

444. An oath is an outward pledge given by the person who takes it, that his attestation or promise is made under an immediate sense of his responsibility to a Divine Being: who, according to *his* belief, will be displeased at being called upon to witness the utterance of a falsehood. The form may, and more often does, contain a virtual or a direct expression of accountability; and this is the least notion of Deity which is consistent with the nature of an oath, in that sense

Definition of an oath,

(1) M.A.13. A.W.153. 31 & 32 Vict. c. 72, s. 14.

(2) Since 1867 jurors objecting to be sworn may make a declaration.—30 & 31 Vict. c. 35, s. 8.

(3) M.A.96. A.W.152. The proviso dispensing with an oath "in any case where by law a solemn affirmation may be made instead thereof," has been transferred from sec. 13, as to the swearing of witnesses, and added to sec. 96, as to the administration of oaths. If this had been all, it might have been objected to the statement in the text that the law had provided for the case of persons required to be

sworn as witnesses, and jurors; but had not contemplated the case of members of a court martial—and therefore that the obligation to require an oath was left where it was; but the intention of the alteration has not been left in doubt, for a similar addition has been made to A.W. 152 (relating to the swearing of the court, the case of witnesses being dealt with in the next article), and provides that "nothing in *this article* contained shall be construed to render an oath necessary in any case where by law a solemn affirmation may be made instead thereof."

as it may be
received by a
court martial

for witnesses,

may be
deviated from,
when other
form more
binding.

A peer of
parliament
must be sworn.

The ceremony
accompanying
an oath is not
prescribed,

not being in
any case
essential.

Form observed
on ordinary
occasions.

Roman
Catholics.
Exceptions;
on the Book
of Common
Prayer,

Mahomedans,
Jews, Sikhs,
Hindus,

in which alone it can be administered as legally binding in *any* court of justice, where the necessity of this sanction is imperative by act of parliament.

445. The hundred and fifty-third article of war directs that all persons who give evidence before any court martial other than those who are by law empowered to make a solemn affirmation, [§452] are to be examined on oath, in the following words: "The evidence which you shall give before this court shall be the truth, the whole truth, and nothing but the truth. So help you God."

446. Peers are sworn as other witnesses; nor does their privilege of giving judgment on honour, and *not* on oath, apply when assisting as members of a court martial.

447. It is obviously most conducive to truth to swear all witnesses according to the particular form which they may deem most solemn, and with whatever ceremonies may be likely, from previous associations, to create the greatest impression, and so promote the object of the law in requiring a *religious* sanction. On this principle the external ceremony, not being the essence of the oath, is held to be matter of variable form. The words are prescribed for witnesses, [§446] but the outward act is still left in all cases to custom. Ordinarily the member or witness takes the bible or new testament in his right hand ungloved, and then kisses it: with a Roman Catholic the book is closed and a cross is marked on the cover. If the oath be taken on the common prayer book which hath the epistles and gospels, it is good enough, and perjury upon the statute may be assigned upon this oath. (4) Mahomedans of different sects are sworn on the koran, sometimes kissing it, or placing it on their head. Jews are sworn on the pentateuch. (5) Sikhs on the grinth. Hindus may be sworn by the vedas. On the occasion where the legal validity of a heathen's oath was first affirmed, (6) the

(4) 2 *Keble*, 314, *contra* by *Windhom* of a psalm book only. A witness professing Christianity objected to be sworn on the Evangelists, and was sworn on the Old Testament, on stating that he considered that to be binding on his conscience.—*Ryan and Moody*, N. P. C. 77. See §449.

(5) Where a Jew had assumed a false name and been sworn as a Christian on the New Testament, and a

new trial was applied for on this ground, it was refused, as by *taking* the oath he clearly subjected himself to all the *temporal* obligations.—1 *Phillips*, 18.

(6) The often quoted case of *Omychund v. Barker*, *Atkyns*, 21-51. "Certain of the witnesses, subjects of the Great Mogul, and professing the Gentoo religion, had been sworn at Calcutta, a factory within that country," in

Hindu witnesses were sworn by touching a brahman's foot; but the form of Hindu oath varies according to caste and the part of the country, and it has become the practice of the courts in India to receive the affirmation of Hindus and Mussulmans on all occasions instead of an oath.

Their oaths very various, and now for the most part dispensed with.

448. It has been recommended to collect some account of the forms of oath most likely to be required by courts martial, but a brief compilation would far exceed the limits of this work, and, if complete, would be more curious than practical, as the proper form is in most cases easily ascertained in each country when required. It would be impossible to collect information which might be relied on in every case, and the attempt would most certainly (7) fail, precisely where information might possibly have been useful.

It would not appear necessary to give any more precedents of form of oath.

449. The object is to use the oath which most strongly impresses the obligation of telling the truth; and as a rule this will be that authorized by the custom of the country; but a court martial must allow any form the witness declares to be binding on his conscience. The 1 & 2 Vict. c. 105 enacts that every person shall be bound by an oath, provided the same shall have been administered in such form and with such ceremonies as he may declare to be binding, and, in case of wilful false swearing, shall be punished in the same manner as if it had been administered with the form most commonly adopted.

The most solemn form of oath should be adopted, but a court martial may allow any,

and false swearing is nevertheless punishable.

450. The persons by whom the oaths shall be administered to the court are specified in the articles of war: [§ 520] witnesses are usually sworn by the judge advocate at general,

Form of administering oaths, by whom to the court, to witnesses,

1742, according to the most *solemn* form of their religion, and after the prescribed *words* had been recited to them. The admission of their evidence was objected to, not only upon technical grounds, but also on the broad principle that it was improper for a Christian court to accept an oath sworn by *false* gods. After hearing the arguments of the leaders of that day, and taking very ample time for consideration, the lord chancellor (Hardwicke) overruled the objection.

(7) In 1835 the writer was a member of a general court martial at Fort Willshire, on the eastern frontier of the Cape, when several Caffres were examined, and took the same oaths as in trials amongst themselves. We

could not have found precedents in law books, even if there had been a library to refer to, but the multiplicity of oaths volunteered by the same witness, and even many of the particular forms adopted, afforded an additional instance of the similarity of customs in different countries and distant ages. The common Caffres uniformly swore by the subordinate chief of their tribe. A petty chief, in addition to his immediate superior, swore by the *King of England*, which was noticed at the time as marking how readily the natives accepted the new state of things consequent on the oath of allegiance to the crown, which they had taken a few weeks before on the cessation of hostilities.

by a priest,
to a Jew.

Subterfuges of
dishonest
witnesses.

The manner in
which an oath
is administered,
ought not to
be considered
unimportant.

OATH DISPENSED
WITH,

not only in
certain cases of
conscientious
scruple,

and by the president at other, courts martial: but if the opinion or prejudice of a witness should render it expedient, the oath may (in open court) be administered by a minister of his religion, as is usual with natives of India. It may be observed that a Jew who wears his hat in the synagogue, should wear it whilst being sworn. Upon the same principle (1) soldiers, who remain covered in the presence of the court, invariably uncover whilst taking the oath. Jews regard no oath as obligatory unless their head is covered; nor is their folly, to borrow the language of a modern treatise, (2) a single shade more degrading than the subterfuges by which too many of our own countrymen attempt to deceive both themselves and justice. It is notorious, for example, not only at the Old Bailey, (though that court has given the name to this particular species of fraud), but elsewhere, that many a witness, if he can but escape observation and kiss his thumb instead of the book, will pledge himself to any falsehood without apprehension of incurring the guilt of perjury; another shift resorted to by the dishonest is to say nothing, but when the oath is recited in the second person, to kiss the book, and so fancy they have escaped the responsibility.

451. The decent solemnity which is customary at courts martial is very different from the unimpressive and irreverent manner of administering oaths too often observable in civil courts; nor is this favourable contrast unnoticed by the learned author before referred to, by whom also it is most judiciously remarked, that as the manner in which the thing is done has often a far greater influence upon the generality of mankind than the real character of the thing itself the mode of administering an oath becomes a subject of very great importance.

452. The provisions of the law are now referred to the mutiny act and articles of war, but courts martial under the provisions of the special acts had previously received the affirmations of Quakers, Moravians, and certain other persons who entertained a conscientious objection to an oath; and also, in India, (3) in the case of high caste brah-

(1) The custom of taking off the right glove no doubt originated in a reverential feeling for the religious act of a solemn appeal to God.

(2) Tyler on Oaths (1836), 47.

(3) The special provisions of the Indian mutiny act were embodied in the mutiny act in 1863.—M.A.96.

mans and other natives, who hold the usual form of oath to be forbidden by their religion. This relief was extended in 1861 by an act of parliament enacting that, "If any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following: *videlicet*,

but also under the provisions of a general statute,

which permits all persons refusing from conscientious motives to be sworn in criminal proceedings, to make a solemn affirmation or declaration.

"I, A.B., do solemnly, sincerely, and truly affirm and declare, That the taking of any oath is according to my religious belief unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c." (4) This "&c." of the act may of course be expanded according to the circumstances of any particular case; and the Queen's Regulations authorize, (5) but do not imperatively enjoin, the completion of the solemn affirmation by the words—"That I will speak the truth in the matter now under investigation."

Statutory form of words of solemn affirmation,

supplemented by the regulations for the army.

453. In addition to the case of alleged conscientious objections, courts martial, when they require the testimony of persons insensible to the obligations of an oath, are enabled to receive it for what it is worth, and to dispense with an oath which in their case would be a meaningless formality. Ever since 1844 they have been able to avail themselves of a relaxation of the law of England, under the conditions imposed by the colonial acts, in those colonies where, by virtue of the act 6 Vict. c. 22, the colonial legislatures have made laws or ordinances for the admission of the unsworn testimony, "*in any court*," of "tribes of barbarous and uncivilized people, who, being destitute of the knowledge of God and of any religious belief, are incapable of giving evidence on oath in any court of justice." In the year 1869 the principle of the old law was entirely reversed, and it was enacted that "If any person called to give evidence in any court of justice,

Oath also dispensed with in the case of

savages,

(4) 24 & 25 Vict. c. 66, s. 1.

(5) "May be given." Q.R.App.A, 6. of the next paragraph [§453] seems preferable, as being more simple, and better adapted to effect its purpose.

Oath also
dispensed with
in the case of
atheists,

and others,
insensible to
the obligation
of an oath,

but they
nevertheless
are subject
to the temporal
punishment
of perjury.

All trials by
courts martial
take place in
open court;

but they
deliberate
in secret,

and may
forbid the
publication of
its proceedings
during the
trial.

Parties may.
claim the

whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to, as incompetent to take an oath, such person shall, if the presiding judge (6) is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.' (7) In all these cases it is enacted that persons making the affirmations, [§ 452] declarations, and promises thus admitted by law, and wilfully and corruptly giving false evidence, are punishable for perjury as if they had taken a false oath.

454. All deliberation of the court takes place with closed doors. At other times, except to those persons who have been summoned as witnesses, [§ 471, 942] a court martial is open to the public, military or otherwise, subject to the capacity of the room or tent in which it is held, and the convenience of the court and parties before it. The president orders the clearing of the court for deliberation, or any incidental discussion, when he may deem it expedient, or at the instance of a member or the judge advocate. Where it is more convenient, the court withdraws for deliberation. (1) Courts martial formerly, in certain circumstances, used to forbid the publication of a report of the trial during its continuance, but the present practice is to admit reporters without imposing any restriction. (2)

455. The parties before the court may claim the benefit

(6) Doubts having arisen as to the extent of the words "presiding judge" and "court of justice" in this section of the act of 1869, it was enacted by the 33 & 34 Vict. c. 49, s. 1, that they should be "deemed to include any person or persons having, by law, authority to administer an oath for the taking of evidence."

(7) 32 & 33 Vict. c. 68, s. 4. It may be observed that, under the former law, § 452, the objection was that of the witness. Now a witness may either object himself to take the oath or be objected to, and the court must in either case allow the objection, if satisfied that an oath would not bind his conscience. Hence, as pointed out by Mr. Taylor, "an enquiry must always be

made into the religious opinions and moral sentiments of the witness, and it is as necessary now, as before the act was passed, to gauge his faith in a Deity, who is alike the rewarder of truth and the avenger of falsehood." —Taylor, 1201.

(1) It will be observed that the alternative, which was adopted at the Aldershot court martial, is contemplated in the new regulations.—Q.R. App.A.11e.

(2) Accommodation for the press was provided at the Aldershot court martial by the express direction of the highest authorities. [§492]

This was also done in Dublin at the Fenian trials.

of its aggregate opinion, on any disputed question of law or custom arising out of the proceedings, in the decision of which the parties may be interested.

opinion of court, in questions of law and custom.

456. The majority of votes decides all questions as to the admission or rejection of evidence, and on other points involving law or custom; and in such cases, (but not as to challenges or the finding and sentence of the court,) where the votes are equally divided, the custom of the service, and the necessity of the case, justifies the decision of the question on the side on which the president may vote.

Decision of incidental questions.

457. It is not only within the power of a court martial, but a duty, the neglect of which may incur censure, to judge of the propriety of the charge, not only as regards the nature of it in respect to their jurisdiction, but also, whether the wording is sufficiently precise and the crime clearly defined. It was suggested in former editions of this work that it would perhaps conduce to regularity, and might occasionally obviate much inconvenience, if courts martial were invariably cleared before the arraignment of the prisoner, to consider the charge; and the new regulations now instruct courts martial that "no court martial should proceed to trial until they have satisfied themselves of their competence to deal with the charge, both as respects their jurisdiction and the precision with which the charge is worded." (3) The following is an extract from a general order, 13th December, 1813, promulgating the Prince Regent's confirmation of the sentence of a general court martial held at Ariscum, in Spain, on Captain Peshall, 88th Regiment:—"I am further to acquaint you, that the Prince Regent considered that the latter part of the charge ought not to have been the subject of investigation before the court, as well from the *vagueness* of its *wording*, as from its forming a most serious and distinct subject of accusation in itself; but His Royal Highness at the same time remarked, that although the conduct of the prosecutor and *the court* appears to have been irregular, the one in preferring an accusation so indirectly framed, and the other *in receiving* it, yet that the circumstances detailed in evidence were of a nature to preclude the favourable consideration which might possibly be given

The court must consider the charges; in respect to jurisdiction,

form, substance.

Court martial reprimanded by Prince Regent for receiving a defective charge;

may decline to enter upon a defective charge;

but have no authority to alter charges without the sanction of the convening authority.

Independence of court.

Cases of difficulty.

to the case of Captain Peshall under a charge of absence from his regiment alone: His Royal Highness could not fail, therefore, to confirm the sentence of dismissal, but was graciously pleased to command that, under all the circumstances of the case, the prisoner should be allowed to retire from the service with the value of the commission he purchased, which appears to be his lieutenancy.(4) The court martial on the trial of Lieutenant Colonel Austin, 60th Regiment, "determined that the first part of the fourth charge was too generally laid, for it to take cognizance of that part."(5)

458. Courts martial have no authority to arraign a prisoner upon charges other than those upon which he has been ordered for trial, except what is manifestly a mere clerical error, unless such altered charges receive the sanction of the convening authority. [§ 551]

459. The highest military authority cannot interfere with any of the proceedings of a court martial, much less dictate to it. If any point arise upon a question of law, or otherwise, respecting which the court requires advice or instruction, and it is not satisfactorily afforded by the officiating judge advocate, the court, if a reference does not delay their proceedings, may refer the point to the judge advocate general for his legal opinion, the question being stated to him by the president,(6) or, under the direction of the court, by the judge advocate; otherwise the court adjourns, and, through the president, reports to the commander of the forces, or to the officer by whose authority the court was convened. The

(4) The charge against Captain Peshall was as follows: "For being absent from his regiment, without leave, from the 24th June, 1813 (the day upon which his suspension by the sentence of a general court martial terminated), until the 28th of the following July, during the whole of which period his corps was employed on most arduous and active service in the presence of the enemy; this latter circumstance, of which Captain Peshall could not have been ignorant at the time, and the probability of which he must have known before the termination of his suspension, rendering his absence, without leave, at such a period, doubly culpable, and, coupled with his conduct on some former oc-

casions, raising, at least, a suspicion that it was intentional."

(5) It was worded as follows: "For conduct highly unbecoming the character of an officer and a gentleman, in being concerned in traffic."

(6) The former course was adopted by General Sir G. A. Wetherall, president of the general court martial at Aldershot, for the trial of Lieutenant Colonel Crawley. The answer did not appear sufficiently full to the court, and the president again sent the questions to the judge advocate general, and they were entered on the proceedings together with his answers.—*Proceedings*, 30th Nov. and 7th Dec. 1863; *Printed Trial*, pp. 56, 75.

judge advocate is sometimes instructed by such officer to communicate with the judge advocate general, if the trial be held at home: or, if held abroad, to obtain the opinion of the attorney or solicitor general, or law authorities, on the spot. The members of courts martial would do well to recollect that although—so long as they do not exceed their jurisdiction—no court is competent to stay proceedings or revoke a sentence, they are collectively and individually responsible to the supreme courts of civil judicature, not only for any abuse of power, but for any illegal proceedings. (7)

Responsibility
of members of
courts martial
to a court
of law

460. It is probable that officers are too much disposed to consider, that by acting upon the opinion of the officiating judge advocate, on questions of law, they are thereby exonerated from responsibility, both legally and morally. Instances might be quoted where the advice of judge advocates has been acted on, which could not be supported by reference to the established practice and decisions either of courts martial or courts of civil judicature; and where the incorrectness of the advice, had members permitted themselves to question it, might have been easily detected. Whatever degree of deference may be due to the advice of the judge advocate, it must be remembered that he is not responsible to any court of justice for the opinion he may give, and—influenced as all the members ought to be, by any reasoning which may tend to correct their judgment—they are still bound by their oath to administer justice, when any doubt may arise, according to *their* (8) conscience, the best of *their* own understanding and the *custom of war* in like cases.

is not shared
by the judge
advocate
who attends
the court.

461. The judge advocate general has not been required to officiate at a general court martial for more than fifty years; and successive holders of this most responsible office have laid—and have rightly laid—great stress upon the necessity

The judge
advocate
general has
ceased to act
as assessor of
courts martial.

(7) Lieutenant Frye, of the marines, in 1743, brought an action in the court of Common Pleas against Sir Chaloner Ogle, the president of the naval court martial, which had convicted him of disobedience of orders, and sentenced him to fifteen years' imprisonment. It appeared that Lieutenant Frye had been fourteen months in confinement, and that he had been convicted on illegal evidence—the depositions of illiterate persons reduced to writing

several days before the trial:—he had a verdict in his favour for 1000*l.* damages. The judge moreover informed him that he was still at liberty to bring his action against any of the members of the court martial.—1 M'Arthur (1813), 436. See § 758-8.

(8) See the reasons of one of the lords of the Admiralty for not signing the warrant for Admiral Byng's execution.—Smollett, iii. 336.

of their being able to approach the consideration of the proceedings of courts martial, upon which it is their duty to advise the crown, from a wholly impartial and unprejudiced position. (1)

Judge
advocate, how
appointed ;

462. General courts martial, "for the more orderly proceedings of the same," are attended either by a judge advocate, appointed by commission under the sign manual; by a deputy judge advocate acting by deputation, either permanent or special, under the hand and seal of the judge advocate general; (2) or by a person (3) appointed to execute the office of judge advocate at general courts martial convened by officers commanding the forces abroad. (4) The warrants held by these officers contain (5) a power to make appoint-

(1) The judge advocate general continues to frame and sanction charges; but it was agreed "that his department should not be called upon to take part in the actual preparation, conduct, or management of prosecutions; and that for these purposes a solicitor should, in cases of difficulty and importance, be appointed by the Horse Guards."—(Memorandum, 13th April, 1864. *Court Martial Commission*, Report, page 233.) The articles of war of 1860 had for the first time prohibited the officiating judge advocate from acting as prosecutor [§ 472], and the disadvantages of a permanent official of the department taking part in the prosecution had been very manifest at the trial of Lieutenant Colonel Crawley in the winter of 1863.

(2) The judge advocate general is a parliamentary officer, appointed on a change of ministry, and holding office by letters patent under the great seal. [§ 1280] He is sworn of the privy council, and is the responsible adviser of the crown as to the legality of all general courts martial held in the United Kingdom, and of all general courts martial held abroad, except India, when officers are sentenced to death, penal servitude, cashiering, or dismissal, and of any other general courts martial which officers commanding in India and elsewhere abroad may think proper to transmit to him. He also reviews the proceedings of the general courts martial, confirmed by commanders in chief abroad, which may be brought to his notice; and also of all district or garrison courts martial at home. He is also the confidential adviser of the commander in chief,

and gives his opinion upon emergent cases of military law, which may be referred to him by presidents or judge advocates of courts martial, and by general and other officers in command; and, lastly, in addition to other duties, which it is not necessary to detail, he has the custody, under the provisions of the articles of war, of the proceedings of all general and district courts martial.

(3) On the trial of the Canadian rebels by martial law, in 1838 and 1839, three persons, one officer and two civilians, were "jointly and severally" appointed to the duty of judge advocate. At the trial of Mr. Smith, at Demerara, a civilian was appointed judge advocate, and two other civilians to act as assistant judge advocates.

(4) The judge advocate general submitted "a scheme of education for officers desirous to qualify themselves for such offices in future;" and suggested "that when due time had been given for candidates to prepare themselves, no one shall be appointed to the office in question without undergoing a satisfactory examination in the specified subjects."—*Report, Court Martial Commission*, page 242. "The following is the scheme" which was submitted to the secretary of state for war:—

"Mutiny act.

Articles of war.

Stephen on Criminal Law.

Taylor on Evidence (Chapter on Witnesses).

Simmons on Courts Martial."

Letter, No. 14, *ib.*, page 241, and Evidence, Mr. Headlam, Q. 2633.

(5) § 1255, 1261, 1266.

ments from time to time, in *default* of a person appointed by Her Majesty or deputed by the judge advocate general, or during the illness or occasional absence of the person so appointed or deputed, and to delegate these powers to any officer duly authorized to convene a general court martial.

Judge advocate.

463. In 1864, with a view of improving the administration of justice by courts martial, it was thought advisable to increase the powers and duties of the officiating judge advocate at general courts martial, and a proposition was agreed to and embodied in a Horse Guards' memorandum, dated 23rd June, 1865, as follows: "The officiating judge advocate at a general court martial should represent the judge advocate general; should be deputed by him; and, if possible, be selected either from officers who have passed an examination in military law, or from barristers, it being understood that when counsel are employed either for the defence or for the prosecution, the officiating judge advocate should be a barrister." It was, however, considered that to supersede the military judge advocate by a civilian (6) would be attended with inconvenience to the service, and that it was generally advisable that when a barrister was employed, he should assist (7) and not supersede him; and the above-quoted circular was recalled, and the memorandum, amended by the omission of this paragraph, was issued on the 18th June, 1866. (8)

The military judge advocate not to be superseded by a barrister.

464. The appointment of a judge advocate may at any moment be revoked by the authority which made it, and a judge advocate may be relieved during the course of a trial, [§ 532] and another appointed. But the presence and assistance of an officiating judge advocate, duly appointed, are essential to the jurisdiction of a general court martial. A general court martial at Portsmouth, in 1839, sentenced a soldier of the 8th regiment to be transported; but it having appeared that the officer officiating as judge advocate on the

Assistance of judge advocate essential to the jurisdiction of a general court martial.

Failure of justice, for want of lawful appointment.

(6) The appointment of a civilian to officiate as judge advocate was not unusual until a War Office circular directed the appointment of military men instead of "gentlemen of the law." (*War Office*, 6th April, 1802.) Civilians have, however, been subsequently appointed at trials, under martial law, upon civilians. [§ 461*n*]

(7) This course was adopted at the

Jamaica trials in 1866-7, and the Fenian trials in Ireland in 1866.

(8) This now forms part of the Queen's Regulations (App.A, 10), under the head of "Powers and duties of deputy judge advocates." The correspondence as to these changes is given at full in Appendix II. to the Report of the Courts Martial Commission, pages 239-246.

Judge advocate. trial had not been duly appointed or deputed, the prisoner was released, and his punishment remitted.

Judge
advocate not
challengeable,

465. The judge advocate cannot, on any grounds, be challenged; but an objection may be represented to the authority under whose warrant he is officiating. It had been held that the officiating judge advocate should not blend the character of witness for the prosecution with that of judge advocate; and in 1863 it was expressly provided in the hundred and sixty-second article, that "no person being a witness for the prosecution should also act as judge advocate at a trial;" a similar provision as to the judge advocate not acting as prosecutor having been made in the year 1860. The union of these characters gave the appearance of unfair influence against a prisoner on his trial.

and relieved
from anomalous
functions.

Duties, various
and important;

466. The duties of an officiating judge advocate are various and important; as will be apparent upon an attentive consideration of the preliminaries to a general court martial, and the whole of the subsequent proceedings. Before the assembly of the court he summons the witnesses. [§ 890] It is no longer his duty to furnish the prisoner with a copy of the charge, [§ 416] but he will do well to ascertain that he has duly received it. He provides, under the direction of the superior authority, for the accommodation of the court on assembling, and is authorized, if necessary, to hire rooms for the purpose. (1) We have seen that he has been most advantageously relieved from the office of prosecutor, and that he can "take no part in the conduct of the prosecution;" (2) but he still unites the duties of two offices which were formerly distinct, that of the judge or assessor, called in (*advocatus*) to advise the court, and that of the clerk or notary, who took down the proceedings in writing. (3) He registers and records all

(1) The sum actually expended, as also for stationery, postage, fire, and other contingent expenses, is repaid on the production of the vouchers and the certificate of the president. Officiating judge advocates, or deputy judge advocates not holding appointments on the staff, include in this account their claim for the daily allowance under the royal warrant of two guineas for each day of actual sitting of the court, and for any intervening Sundays, but not for more than two days in the whole for adjournments. Explanatory Directions, p. 167. R.W. 166; R.W. (Travelling Expenses), 37.

(2) Q.R.(1868)7714.

(3) The earlier articles of war required this office to be performed under the express sanction of an oath.—"At a general court martial there is a clerk who is to be sworn to make a true and faithful register of the proceedings of that court." In "the army in the north, under the command of William, Earl and Marquis of Newcastle," in the year 1644, "the clerk or notary of the court" was to "swear before the twelve judges of the court that he shall truly and without fraud execute his office, not adding or diminishing for friendship, malice, or bribery any-

the acts of the court, all applications and requests submitted to it by either prosecutor, prisoner, or persons in attendance as witnesses; all oral evidence, as nearly as may be, in the very words of the witness; and also all questions whether allowed or rejected, and the observations of the parties for or against their admission. He notes the hour of assembly and of adjournment; and the cause, if the adjournment is at an earlier or later hour, or for a longer period than usual; and, generally, all incidental occurrences, particularly the clearing of the court, the cause thereof, and, where interlocutory judgments are given, the decision. The judge advocate, whether consulted or not, advises(4) the court on points of law, of custom, and of form, and invites their attention to any deviation therefrom; and, when requisite, [§ 608] sums up the case, before the court is closed.

467. When the prisoner and prosecutor are assisted by counsel, it has become a practice to allow the officiating judge advocate similar assistance, if he desires it. At home application must be made through the judge advocate general to the secretary of state for war before counsel are retained. [§463*n*]

468. It is generally understood that the parties before the court have a right to the opinion of the judge advocate, either in or out of court, on any question of law

thing delivered to him in court or elsewhere, to the hindrance of equity and justice; that he precisely keep undefaced and uncanceled all the records and the whole acts and dealings of all men having any in the court, whether they be tried or untried, in controversy and not determined, and that he keep and conceal all things which he hearth in the court, either said or done, as ended and determined, secret and close to his life's end."

(4) Q.R.App.A, p. 10*b*.—It has hitherto been the avowed anxiety of military men to prevent their proceedings from being overlaid with unnecessary technicalities, borrowed from the civil courts, and it must surely be from inadvertence that "*Amicus Curie*" has been so prominently brought forward to designate the prisoner's friend, or a legal adviser of the parties before a court martial. If this law term must be made use of at all, would it not be more applicable to the officiating judge advocate?

General Sir C. J. Napier, on the very subject of legal advisers (*Re-*

marks on Military Law, p. 93), has very well said, that soldiers have a language of their own. Their coining a new word, or using an old word in a new sense, may find its excuse in the necessity which arises, when the *thing* exists without having a *name* which will at once suggest the idea; and, so far, borrowing occasionally from the lawyers may be desirable, in order to prevent unnecessary circumlocution or inconvenient paraphrase.

In this instance, however, the already received words express all that is wanted, and are not liable to be misunderstood. Besides which, the adoption of this law term into our military vocabulary appears the less desirable, as it has been appropriated in a manner so very foreign to that in which it is ordinarily used. Some little pains have been taken, but *amicus curie* has not been found anywhere in law books with a different sense from that in which it is used by Sir E. Coke: "If a judge is doubtful or mistaken in matter of law stander-by may inform the court *Amicus Curie*."—2 Inst. 178.

may be assisted by legal advisers when sanctioned by the war office.

How far bound to assist a prisoner,

arising out of the proceedings. Whenever he is thus called upon to give an opinion in open court, it is the more correct course that it should appear on the proceedings together with the application. Mr. Tytler considers that the judge advocate is bound to assist the prisoner in the conduct of his defence; (5) but it is more in consonance with the custom of the service, that the judge advocate should only interfere to the extent to which the court itself is bound to interpose; to take care that the prisoner shall not suffer from a want of knowledge of the law, or from a deficiency of experience, or of ability to elicit from witnesses, or to develop by the testimony, which in the course of the trial may present itself, a full statement of the facts of the case, as bearing on the defence. To this extent, the court martial and judge advocate are bound, it is conceived, to offer their advice to the prisoner. Justice is the object for which the court is convened, and the judge advocate appointed. To this aim all their enquiries and attention ought to be directed; and if, in carrying out this purpose, the prisoner should be benefited, the efforts of the court, or of the judge advocate, will have been satisfactorily and legitimately exerted. (6)

not entitled
as a matter of
right to record
opinions given
in closed court.

469. If at any time, by inadvertence, a member, in passing sentence, should deviate from the letter of the law, or assume a power at variance with it, it is clearly the duty of a judge advocate to point out the error; (7) but, in opposition to the opinion of Mr. Tytler, (8) it is believed that, should the court decline to act upon his advice, the custom of the service will not only prohibit a record of the judge advocate's dissent in form, but that it will exclude it in any shape; and that he will not, as a matter of right, be permitted to enter, on the face of the proceedings, any opinion, either on a controverted point or otherwise, which, at any period *when the court is closed*, [§468] he may think it his duty to offer. (9) The record

(5) Tytler, 355.

(6) "In all cases where a prisoner is undefended, the deputy judge advocate is to take care that the prisoner does not lose any privilege that the law allows him in the conduct of the trial."—Q.R.App.A, 10f.

(7) This has now been made matter of express regulation: "Whether consulted or not, he will give his advice on any matter before the court. He

is responsible for the due formality and legality of the proceedings."—Q.R.App.A, 10b.

(8) Tytler, 354-5.

(9) It is considered only right that the reader should be informed that this statement (as to the inadmissibility of a claim on the part of judge advocates to record opinions, given by them in closed court) was called in question by several officers in the

is confined to the proceedings of the court; it is not usual, nor would it be right, to detail the grounds which might have led the court to the result finally adopted. The decision only of the court, both as to interlocutory and final judgments, is made known, but in no case the details of any discussion or the judgment of particular members. As well may an individual member desire a right of protesting as the judge advocate, and on much more plausible grounds, the members of a court martial being individually amenable to a superior court of justice for the sentence which the court may record, whereas the judge advocate, having no decisive opinion, (1) is not, in any case, *legally* responsible.

470. But although the power of deciding ultimately remains with the court by reason of the court martial oath, still the regulations of 1873 lay down, "The opinion of the deputy judge advocate *must* be conclusive upon any point of law or procedure which arises at a trial which he officially attends;" (2) and there can be no question, as was remarked in former editions of this work, that where a point of law has escaped notice, it must be a rare occurrence for a court martial, after having been put on its guard against committing an illegality, to persist in opposition to the judge advocate, if he has himself arrived at his opinion

A legal opinion ought to be conclusive with the court, but if it persists in an illegality,

judge advocate general's department of the then Company's army, who inclined to the opinion that the judge advocate has a right to enter a protest on the face of the proceedings.

It is believed that such pretensions have never received any countenance in the judge advocate general's department at home; and it may be further urged, in defence of the opinion above given, and first published by the author in 1830, that it was offered as his impression of the custom of war in like cases, but not without consideration or availing himself of more extended experience.

After some thirty years' practical acquaintance with the customs of Her Majesty's service, though still unavoidably ill-informed as to any exceptional usages in the army in India, he did not alter this passage in the second edition, which was the last that had the advantage of being revised by him. From subsequent remarks upon it, he learnt what may have been a practice, often acquiesced in (but, it may be observed, in many

cases not allowed) by courts martial in that country; but several years' experience as a deputy judge advocate did not suggest a wish to see it adopted elsewhere; he conceived that the existence of a right, such as that contended for, might tend to promote dogmatism in the judge advocate, and to make members less likely to listen to arguments, to which, if offered without assumption, they would readily attend.

(1) "The judge advocate can do no more than submit his opinion to the court: he cannot prevent a determination contrary to his opinion, and of course is not responsible for such determination."—Sir Charles Morgan to Mr. Tytler (at that time deputy judge advocate in North Britain), 27th May, 1799.

(2) Q.R.App.A, 10d. The regulations of 1868 read "ought" instead of "must," which now replaces it; and it will be observed that the new regulations are more definite on other points as to the power and duties of the judge advocate.

on sufficient grounds, and is able to bring them in a clear and intelligible manner to the attention of the members.

it may be brought to the notice of the superior authority by the judge advocate,

471. If the court will not attend to the advice he may think it his duty to offer upon any matter before the court, [§469*n*] it then becomes the duty of the judge advocate, in order to prevent the confirmation or execution of a sentence which may not, in his opinion, be warranted by the law, to transmit the proceedings to the judge advocate general at home, or to the confirming authority abroad, "*together with a statement of those circumstances which he considers material as affecting the legality of the proceedings.*" (3) A confidential communication of this sort was allowable when the oath of secrecy taken by the judge advocate did not extend to the sentence of the court; and it is now provided for by means of the exception, which was inserted when an addition was made to the form of oath in the year 1844. (4)

under an exception expressly made in the oath of secrecy.

PROSECUTOR.

Prosecution always at suit of the crown,

472. The articles of war of 1860 provided that the officiating judge advocate (1) shall in no case act as prosecutor. The duties of prosecutor devolve on a staff officer ordered to perform the duty, or on the prisoner's commanding officer, or a field officer of the regiment; or, at minor courts martial, and for less important charges, on the adjutant. Formerly, where the accusation involved distinct transactions, the conduct of the prosecution was entrusted to different persons as they might have been more particularly ac-

(3) Extract.—Letter, judge advocate general to a field officer who had stated that, in his opinion, the court at which he was officiating as judge advocate was proceeding to give an illegal sentence, and that it appeared to him, that, "if the deputy judge advocate is not to enter his opinion on the proceedings, he may be supposed to have concurred with the court, and thereby incur undeserved censure."

(4) See Form [§ 440] where the addition is shown in *italics*. In the case of Captain Jervis, General Sir W. Mansfield was informed "by official report" (*Para. 49, Letter to Military Secretary, 19th February, 1867, Parliamentary Paper, 464*), of the numbers of the court voting for and against acquittal; and there is reason to believe that a similar official report is not unusual in the Bengal army. This disclosure of the division of the votes

—to say the least—is not an example for imitation. In this particular instance it may not have involved a breach of the *letter* of the oath of secrecy; but if such disclosures became habitual, it would practically involve it in every case where the court was unanimous, as an omission or refusal to supply this information in express terms, could only be attributed to a remaining scruple in this one case.

(1) A.W.159. 'The earlier articles of war were worded as follows: "In all criminal cases, which may concern the crown, His Majesty's advocate general or judge advocate of the army, shall *inform* the court, and prosecute in His Majesty's behalf." Until the alteration of the articles in 1829, the article required the judge advocate to prosecute; and "to inform," that is, "to prefer an accusation," continued in the margin, although expunged from the body of the article.

quainted with the several circumstances to be investigated. It was, however, always considered to be at the suit of the crown, and it is now the better practice of the service that one officer, and he, if possible, not one who is to be called as witness, (2) should be charged with the duty of "getting up the case;" and that at all trials, whether before a general or minor court martial, and whatever legal [§476] or other assistance may be afforded him, he should be held responsible for the conduct of the prosecution, the production of the necessary evidence, and the proper examination of the witnesses. No person can appear as prosecutor before a court martial, who is not subject to martial law; but a prosecution may, and often does, take place at the instance of a person not himself in the service, who in this case is sometimes called the *informant* or *complainant*. After giving his evidence (which should obviously be the first received,) he is allowed to remain in court, that the prosecutor may receive his suggestions, and be able more easily to refer to him; but he is precluded from offering any remark to the court, and confined to the evidence he may be called upon to give.

PROSECUTOR.

ought not to be exposed to the influence of personal feelings.

473. No proceedings in open court can take place except in the presence of the prisoner. Prisoners are occasionally attended by the provost marshal; at other times, by an escort or guard, or by a commissioned officer, as their rank or the nature of the charge may dictate,—officers without sword or sash [§353],—soldiers without their caps, or any other articles they can make use of as missiles. (3) By the custom of all English courts the prisoner, even though he may have been in close confinement, or in irons, has a right, during the trial, to be without irons, unfettered, and free from bonds or shackles of any kind, unless there be danger of escape or rescue, (4) or unless his violent or outrageous conduct renders restraint unavoidable; but a court martial has no

PRISONER.

Prisoners are always present in open court,

free and unfettered,

except where restraint is necessary;

(2) "If possible, no officer, who is to be called as a witness, is to be appointed to act as prosecutor."—Q.R. Instructions—Prosecution. App.B(3). Perhaps no one of recent regulations as to the practice of courts martial is more calculated to effect a practical improvement than the one here quoted. Not only was the prosecutor tempted to supplement his evidence against the prisoner by his addresses to the court,

but the former practice was attended with other inconveniences. It gave occasion for many exhibitions of personal feeling, which called for the animadversions of the court and the confirming authority; and, as in Colonel Crawley's case, [§1018] has led to the trial of charges founded on words in addresses to the court.

(3) Q.R.S.6,p.10.

(4) 1 Leach, 43.

and may be seated.

PROFESSIONAL ADVISERS.

Counsel not permitted to address the court, but may advise prisoner ;

officially recognized.

Court adjourned at the Fenian trials to enable the prisoner to have their assistance,

but only to a specified time.

control over the prisoner, except during his continuance in court. When the court adjourns, the provost marshal, or the brigade, garrison, or regimental authority resumes the entire authority and superintendence. [§356] The prisoner is allowed a seat, as a matter of course in the case of an officer, and in other cases when from his agitation, or illness, or from the heat of the climate, length of the trial, or other circumstances, the court may think proper to order it. (5)

474. Accommodation is afforded on the application of the prisoner for any military or private friend whose assistance he may desire during the trial, (5) or for a legal adviser, if he thinks it advisable to employ one ; but permission for the presence of any person may be revoked by the court in case of any misconduct rendering it necessary. The employment of professional advisers is for the most part confined to general courts martial, though non-commissioned officers and soldiers on rare occasions have availed themselves of similar assistance at minor courts martial.

475. The employment of professional advisers for the defence or for the prosecution, appears to have been for the first time formally recognized in the circular of June, 1865. The paragraph in which they were mentioned was withdrawn, as has already been observed, [§463] but an allusion to the presence of counsel for the prisoner was retained, and a definite instruction on this point is now added to the regulations. (6) At the trials connected with the Fenian conspiracy at Dublin in June, 1866, the prisoner's counsel having withdrawn from the court, the following notification was entered on the proceedings and read by the president : "The court not wishing the prisoner to be taken at a disadvantage, do now adjourn until half-past ten tomorrow to enable him to have the assistance of the same counsel or other, but the trial will then be proceeded with whether counsel appear or not." (7)

(5) At Lieut.-Colonel Crawley's court martial, when the room was arranged after a conference of the highest authorities, the prisoner's table was placed on the left, and the prosecutor's on the right hand side of the table at which the court were seated ; and the witness under examination stood at the bottom of the table, which was, at one time, invariably the

place of the prisoner.

(6) Quoted § 468n, and § 476n.

(7) Trial of Colour-Sergeant Mac Carthy, 53rd Regiment, seventh day, 5th June, 1866. On the 15th June, on the trial of Private J. Keilly, 53rd Regiment, the same legal advisers again withdrew, and the court, after deliberation, announced to the prisoner, who had informed the court that he would

476. Legal assistance is now also provided for the prosecutor, (8) if thought necessary, when counsel are retained by prisoners; and both prosecutor and prisoner have equal opportunities for consulting them privately in open court, and for availing themselves of their assistance in preparing questions for witnesses, writing them out, taking notes, and shaping the several addresses, or occasional observations submitted to the court. But the recognition (9) of their presence has not been accompanied by any relaxation of the well established rule of courts martial as to the silence of professional advisers, and their taking no part in the proceedings. On the contrary, it has been felt most necessary that courts martial should in these circumstances be more than ever on their guard to resist any attempt to address them on the part of any but the parties to the trial. [§ 586]

Legal adviser retained to assist prosecutor.

477. An interpreter may be sworn at any period of the proceedings, if required by either party, or judged necessary by the court. The mutiny act requires that he be duly sworn (10) or make a solemn affirmation before being examined; but there is no form of oath prescribed. The following is very generally used: I, A. B., do swear that I will, to the best of my ability [*or*, of my skill and knowledge], faithfully and truly interpret and translate in all cases in which I shall be required so to do, touching the matter now before the court. So help me God.

INTERPRETER

must always be examined on oath.

Form of oath.

478. In India there is a regular establishment of interpreters, whose appointment depends upon their ability to pass a prescribed examination. In the colonies, courts

May be either regularly detailed for the duty,

employ no other counsel, that they gave him until the next day to reflect whether he would employ other counsel in lieu of the gentlemen who had retired, and that they would then proceed with the trial, whether he had other counsel or not.—*See also* § 536.

(8) At the trial of Lieutenant Colonel Crawley, it was proposed that the officer who was appointed to act as prosecutor should have had professional assistance; but the suggestion was not adopted, as this course was contrary to precedent. Colonel Sir A. Horsford "appeared with the deputy judge advocate general on the part of the prosecution" (*Printed Trial*, p. 7); but from the anomalous position in

which the employment of the latter—virtually as the professional adviser of the prosecutor—involved the department, it is probable that no such expedient will ever again be resorted to, and that, as in the cases already mentioned, [§ 463] legal assistance will be specially retained when required.

(9) "Although a prisoner may have a professional adviser near him during the trial, to advise him on all points, and to suggest, in writing, the questions to be put to witnesses, such adviser is not to be permitted to address the court, or to examine witnesses orally."—Q.R. Instruction, App. B(3).

(10) M.A.13.

or a member,

but not the
judge advocate
or prosecutor.

The court
should take
all due care
to ensure a
translation.

martial usually call upon the regular interpreters before the civil courts, when their services are available. (1) A member of the court is not disqualified on that account; but it would be attended with great inconvenience, and possibly bring him into collision with the parties, if he were to act as interpreter throughout any extended proceedings. On the other hand, where the assistance of an interpreter is required during the deliberation of the court with closed doors, not an unfrequent occurrence when there were foreign corps in our service, a member, or the judge advocate, should obviously be preferred. The same objection applies to the employment of the judge advocate to interpret the depositions of witnesses before they are entered on the proceedings, though he is no longer in any case the prosecutor. A regard to the appearance of fairness suggests the impropriety of accepting the interpretation of an official prosecutor, and absolutely prohibits any interested party from being sworn as interpreter. (2)

479. The greatest caution should be exercised to ensure faithful translation, and to guard against misconception of the true meaning of any expression, either from the in-

(1) On foreign stations, charges for interpreters are made and allowed, in conformity with the treasury circular, regulating the payment of the expenses of "witnesses, &c."—See § 906.

(2) Remarks by Lieutenant General Sir Thomas M. Mahon, commander in chief at Bombay, on a general court martial, held at Karrack, on the 6th April, 1841:—

"An attentive perusal of the proceedings in this case has impressed me with the full conviction of the correctness of the finding on both charges, and of the justice of the sentence; and I regret to observe, that no point of extenuation presents itself by which I could have considered myself justified in withholding my confirmation from the award of the court, had not a material, and what has been previously deemed a vitiating illegality occurred in the proceedings, by the officiating judge advocate, *by whom the prosecution was wholly conducted*, having also been allowed to perform the duty of interpreter in the examination of several witnesses, both on the prosecution and defence. The illegality

of that proceeding was first noticed and animadverted on by General the late Marquis of Hastings (then Earl Moira), when commander in chief in India, and the sentiments of that eminent ornament of the British army, who was deeply versed in every branch of military jurisprudence, form a part of the military code of this presidency, sec. 20, art. 108, p. 143, wherein the practice now adverted to is, without reservation or qualification, declared to be contrary to the principles of justice; and in a subsequent case which occurred in this army, the proceedings were on the same grounds set aside by the then commander in chief in the year 1816. With these precedents, therefore, before me, I cannot give effect to the present sentence, passed under the invalidating circumstances before referred to. Ensign — has thus narrowly escaped the loss of his commission, and I trust that the lamentable position to which his acts of insobriety had reduced him, will ensure a lasting reformation in his conduct."

competence, or from the possible bias of the person employed to interpret. The interpreter should render the very words as closely as possible, and not run the risk of obscuring the proper force of an expression by attempting to give the corresponding idiom, as the court may call upon him to explain any part of his translation, or refer to a second interpreter, if they should entertain any doubt, or be desirous of further information. Upon a question being raised as to the precise meaning of the words used by a witness, they should instantly be taken down in the equivalent Roman character, when the language has a peculiar alphabet, or, as near the sound as may be, when it is not a written language. (3) A party to the trial is at liberty to request the presence and assistance of a private interpreter, and may urge upon the court the propriety of hearing his version of the precise meaning of the witness's words, or an illustration on his part of any phrase which will admit of a second construction being put upon it; and the court, according to the circumstances of the particular case before them, would decide on an application of this nature, neither allowing unnecessary interruption on the one hand, nor obstructing the accurate investigation of justice on the other.

Precautions in interpreting.

The court alone can decide on cases as they arise with a view to the due administration of justice.

480. "The proceedings" is the name applied to the official minutes or record of the proceedings (1) of all courts martial. They are reduced to writing by the officiating judge advocate [§466] on general, and by the president or a member under his superintendence, on other courts martial. When the judge advocate is called as a witness for the defence, the minute of his examination is written by the president. The object of this report of the proceedings is that the superior authority may be aware of everything bearing on the trial which has become known or has taken place in open court. The judge advocate is responsible to the judge advocate general for a proper record of the proceedings, (2) and more especially as respects the proper form. He is also more immediately responsible for accuracy and exactness to the court, who attest the truth of the

THE PROCEEDINGS are recorded under the superintendence of the president.

(3) There are other cases where it would be desirable to retain the original in the proceedings, but it should in no case be allowed to remain without a translation, as many words which

present no difficulty on the spot, may yet be wholly unintelligible to the confirming authority.

(1) A.W.157, 158, 160.

(2) Q.R.App.A,10e.

These minutes should contain a record of everything bearing on the trial;

all questions and documents read.

The names, &c. of the members,

and judge advocate;

a note of their absence.

proceedings by the signature of the president. Not only is the evidence taken down by way of question and answer, (3) and the judgment recorded, but all questions rejected by the court, and all incidental transactions, are noted on the face of the proceedings. The questions, whether answered or not, are to be numbered throughout in a single consecutive series, (4) beginning at the proffer of the challenge. (5) In like manner every communication which may be received, after being read in open court, is entered on the proceedings. (6)

481. The names of the members are registered in the proceedings according to seniority, and the regiment of each is invariably to be annexed to his name, and, if on the staff, his rank and situation are to be distinctly stated. In the event of the promotion of any member during the course of the trial, changing his position in respect to any other member of the court, it is noted on the proceedings. [§491] The name and rank of the judge advocate is in like manner to be added after those of the members. In the case of the secession of a member, [§526] or the absence of the prosecutor, prisoner, or a witness under examination, it is noted on the face of this record, and the cause, when susceptible of proof, is shown by evidence; if

(3) It was formerly not unusual, although the examination of the witness had been conducted by a series of questions, [§954] for the evidence to be entered on the proceedings as a continuous narrative. The regulation which required the evidence to be taken as nearly as possible in the words of the witness was calculated in a great measure to put an end to this practice; but now it would be inconsistent with the Queen's Regulations, as the form in the Appendix requires the examination of witnesses to be entered on the proceedings in the form of question and answer.

Adherence to this regulation may possibly occasion the writing of a few additional words, but experience has shown that it is a saving of time and trouble in the long run; and, even if it were not so, it avoids the inconvenience of representing the witness's evidence as his spontaneous recollection, instead of as answers to the questions, and this—especially if they assumed the form

of leading questions—would be open to the objection of being calculated to give the confirming authority an untrue impression of the actual proceedings.

(4) Q.R. App.B(1).

(5) Trial of Ensign Cullen, Q. 1.

(6) At the trial of Lieut. Colonel Crawley the prosecutor "wished to lay a letter before the knowledge of the members of the court, but at the same time to request that it may not be entered on the proceedings." (*Trial*, p. 66.) The court decided, in accordance with the custom of courts martial, "that the letter handed in by the prosecutor should be read and attached to the proceedings" (*page* 67). On a subsequent occasion the court adhered to its decision "to decline to receive any communication which is not to be read and appended to the proceedings" (*page* 89); and there can be no doubt that every court martial is bound to follow their example.

arising from illness, by the evidence of a medical officer; or, if the subject of enquiry be a civilian, by sufficient medical testimony.

482. Not only is care to be taken that the minutes of the proceedings of all courts martial be fairly and accurately recorded, but the Queen's Regulations (7) further point out that this must be done in "a clear and legible hand, without erasures. When interlineations, which should be avoided as much as possible, are necessarily made, they are to be verified by the president's initials. The pages are to be numbered, and the sheets are to be fastened together. (8) Care is to be taken that sufficient space, at least half a page, is left, immediately below the signature of the president, for the signature and remarks of the confirming authority. The station and date to be added in all cases." When the minutes which the judge advocate has made in court require to be copied, the fair copy ought to be made from day to day in the intervals between the adjournments of the court and its re-assembly next morning; and it is obvious that this duty would be more especially imperative in the case of a shorthand writer being sworn to take the evidence.

Proceedings,
how recorded,

and made up;

483. The proceedings remain in the custody of the officiating judge advocate, who may not part with them even momentarily during an adjournment; but if either the prosecutor or the prisoner apply for, and obtain, the permission of the court, they may be allowed to have access to them out of court, "subject to such conditions of security as the officiating judge advocate might desire, and the court might think fit to impose." (9)

may be referred
to by the parties
to trial.

(7) Q.R.App.A.9. The general regulations (*Edif.* 1837, p. 247) explained that the president was held strictly responsible for this:—but it is the duty of any member, observing an inaccuracy or omission, to call attention to it—and, if there should be a difference of opinion on this point, it is referred as other incidental questions to the decision of the court. The correction of his deposition by a witness under examination is spoken of under that head. [§ 960]

It appears that it used to be the custom for the judge advocate to read the examination of a witness as taken down, and "to ask first the evidence

[witness], then the prisoner and the court, whether they were satisfied with it as expressing the meaning of the deponent."—*Grose*, ii. 164.

(8) When the proceedings exceed a single sheet of foolscap or four pages, or when the printed forms (W.O. Form 642) are used, it is found more convenient to use half sheets of foolscap with a quarter margin. The fastening should be passed through pieces of cardboard or parchment on the outer pages, whenever the proceedings are voluminous, in order to protect the paper from being worn or torn.

(9) J.A.G. 12th March, 1867.

Making up proceedings in duplicate as a precaution against their being lost.

484. The proceedings are made up separately (10) upon each new trial, and authenticated at the end by the signature of the president, immediately following the date of signature, and followed by the countersignature of the judge advocate. Proceedings have in certain cases been prepared and signed in duplicate or triplicate, and the confirmation of such duplicate proceedings is legal if the proceedings were originally drawn in duplicate. If the additional copies of the proceedings were not signed in the first instance, the court may be assembled for the president to sign the duplicate, (1) and it then takes the place of the original, which may have been lost.

Transmitted for consideration to the confirming authority,

485. The judge advocate on general courts martial at home transmits the proceedings to the judge advocate general in London, when the prisoner belongs to Her Majesty's land forces, in order to being laid before the sovereign; and abroad they are in like manner to be transmitted to him after having been finally disposed of by the confirming authority. (2) The proceedings of general courts martial, held abroad, (except in India, and in any army where from time to time the like full powers (3) may be given to the general commanding in chief), are also transmitted to the judge advocate general, in order that he may lay them before the Queen, in all cases where officers are adjudged to suffer death, or penal servitude, or to be cashiered, discharged or dismissed; and in other cases where the general officer may think proper to suspend the execution of any sentence. (3)

and when promulgated, carefully retained in the office of the judge advocate general.

486. The proceedings of general courts martial, whether confirmed by the Queen, or by officers commanding abroad, are carefully preserved in the office of the judge advocate general in London. (4) The proceedings of district or garrison courts martial, after they have been confirmed and promulgated, are forwarded by the president, or on home

(10) Q.R.App.A,1.

(1) J.A.G. 6th March, 1867. In the event of the loss of the proceedings during the adjournment and before the completion of the trial, it may be recommenced *de novo*. See § 748, for the case of proceedings lost after confirmation.

(2) A.W.157. Q.R.App.A,22.

(3) A.W.123, 167. Warrants, Appendix II., III., IV.

(4) All proceedings of courts martial transmitted to the judge advocate general, whether before or after promulgation, are to be accompanied by a covering letter specifying the nature of the contents.—Q.R.App.A,25.

service, by the deputy judge advocate to the judge advocate general's office, (5) and are there preserved for three years. The original proceedings of regimental and detachment courts martial are kept by the corps for one year from the expiration of the imprisonment, or if none awarded, from the date of trial. (6)

Regimental courts martial kept by the corps.

487. When a general or district court martial, before which a soldier may be brought, on the report of the court of enquiry that his maiming or mutilation was the effect of design, the proceedings are sent through the judge advocate general, the commander in chief, and the secretary of state for war, to the commissioners of Chelsea Hospital, in order that they may, when the case comes before them, have the best means of arriving at a just decision, either to grant or withhold a pension. (7)

Exception in case of a soldier tried for self-mutilation, and found guilty of design.

488. The charges, findings, and sentences of all courts martial are entered in the regimental court martial book. (6) Certified copies of the charges, finding and sentences of courts martial, are, in like manner, entered in the officers' court martial book. (8)

Proceedings of courts martial entered in the regimental books.

489. The articles of war provide that every person tried by a general, district, or garrison court martial, or any person on his behalf, is entitled, on demand made within three years from the date of the final decision on the proceedings, to a copy of the proceedings and sentence (paying for the same at the rate of fourpence per folio of seventy-two words), whether such sentence shall be approved or not, as soon after the receipt of the proceedings at the office of the judge advocate general as such copy can conveniently be supplied. (9) These provisions do not extend to copies of the proceedings of regimental courts martial, but, as a matter of fairness, and when reasonable grounds are shown, they are nevertheless given upon application of the person tried, and the payment of the expense.

Party tried by general or district courts martial is entitled to copy.

Copies of proceedings of regimental courts martial are given on the request of the soldier.

(5) Q.R.App.A.24. A.W.157. See § 303.

(6) Q.R.S.23,p.41.

(7) A.W.82.

(8) Q.R.S.23,p.40.

(9) A.W.168. This provision was contained in the mutiny act until 1860. It was for the first time ex-

tended to district and garrison courts martial when transferred to the articles of war.

It is understood that a copy of a part of the proceedings will in like manner be furnished from the judge advocate general's office on a request to that effect.

CHAPTER XIII.

ASSEMBLY OF THE COURT AND INCIDENTS ON ASSEMBLING;
CHALLENGES.

- Assembly of officers for the court.** 490. THE officers appointed to serve on the court martial assemble according to order, [§427] together with any others who may have been directed to be "in waiting" in order to prevent delay in the event of any officer failing to attend, or to replace any officer in respect of whom a challenge may be allowed. The regulations of 1873 lay down a rule as to the dress of officers attending courts martial:—general, in *review-order*; district or garrison, in *marching-order*; and regimental, in *drill-order*. (1)
- Rule as to dress.** The officiating judge advocate takes care [§466] that accommodation for the court and parties to the trial has been provided at the time named for the assembly of the court. [§523]
- Accommodation of the court.** "All official books and orders having reference to courts martial are to be laid before every court when sitting." (2)
- Official books, &c. on table.** The provost marshal, his deputy, or orderly non-commissioned officers detailed for this duty, are previously placed under the orders of the officiating judge advocate for summoning witnesses, giving notice to the members of time of meeting, and generally for giving such attendance as may be required. Upon the trial of an officer it is usual for an orderly officer to be in attendance on the court during its sitting. If there is no provost marshal guard, a guard or sentries, as may be necessary, are furnished, and receive orders from the judge advocate.
- The number of officers fixed in orders being present, they take their seats according to rank,** 491. The presence of the requisite number of officers [§14, 526] having been ascertained, the president, who must in all cases be a combatant officer, [§15] takes his seat at the head of the table, and the judge advocate calls

(1) Q.R.8.12,p.14. This and the following chapters more particularly refer to trials of prisoners by general courts martial; but the form of procedure in all courts martial is essentially the same, and, where not obvious,

attention is drawn to the necessary modifications on trials of appeal from regimental courts of enquiry, and in the procedure of minor courts.

(2) Q.R.8.6,p.57. See Q.R.8.7,p.23. and before § 462.

over the names of the members, who "take their seats according to rank," (3) alternately to the right and left, officers of the regimental staff, or of the civil departments, sitting and voting by seniority, according to their relative rank. (4) If the promotion of a member makes a change in his relative position during the progress of the trial, he takes his seat and votes according to his rank, unless he becomes senior to the president. In that case, the officer who has been appointed and sworn as president continues to perform the duties, and complies with the article of war [A.W.162] as to taking the votes of the court, beginning by that of the youngest member, notwithstanding a member has become senior to himself. After any preliminary business has been disposed of, the court is proclaimed open [§454] by the provost marshal, sometimes by an officer or by an orderly serjeant who is in attendance. The prisoner is brought in under escort; [§473] the prosecutor and witnesses appear in court, but all persons withdraw from time to time when it is cleared by order of the president, for deliberation or upon any incidental discussion.

except when
a member is
promoted over
the president.

The court opens.

492. The seat and table of the judge advocate is at the right of the president. (5) When requisite, accommodation was usually afforded for the prosecutor, on the left, and for the prisoner or his friend, opposite to the president. At the court martial upon Lt. Colonel Crawley in 1863, a different arrangement was adopted. The judge advocate's table was placed at the right of the president, and the members sat along the two longer sides of the table as usual; but the prosecutor's table was placed to the right of the table, and that for the prisoner (6) and his "friends" opposite, on the other side of the room. The witnesses, after being sworn, instead of remaining near the president, went to the place usually occupied by the prisoner at the foot of the table opposite to him. Accommodation was provided for reporters for the press behind the witness, and the court when necessary, withdrew to an adjoining room instead of "clearing the court." As these arrangements were made after a

Place of the
judge advocate
and parties to
the trial.

Arrangements
adopted at the
Aldershot
court martial.

Prosecutor.

Prisoner.

Witness.

Reporters.

Withdrawing
room for court.

(3) A.W.162.

(4) R.W.111.

(5) Q.R.771g.

(6) The prisoner is allowed a seat,
always in the case of an officer, and in

other cases when from his illness, or
agitation, the length of the trial, the
heat of the climate, or other circum-
stances, the court may think proper to
order it.

conference of the commander in chief and the secretary of state for war, and were found to be very convenient, they may serve as a precedent in any case where similar arrangements may be desirable.

WARRANTS and
ORDERS READ.

General court
martial.

District or
garrison
court martial.

Regimental or
detachment
court martial.

Matter of
enquiry brought
before the
court.

493. When the court is assembled by virtue of a special warrant under the sign manual, it is read by the judge advocate general or his deputy. At other trials by general courts martial the order for the assembling of the court is read, and also the warrants of the president and judge advocate, as now required by the regulations; (7) and in these warrants the authority under which they are issued, either a warrant under the sign manual, or the warrant of a commander in chief duly authorized to delegate such authority, is invariably referred to. In the case of a district or garrison court martial, the order assembling the court and appointing the president is read, and it is moreover necessary in those cases where the court is assembled by any officers other than those authorized under the sign manual, and where the existence of a sufficient warrant cannot be presumed as a matter of course, that it be made appear, in some shape or other, that the officer convening it has been duly authorized:—a notification to that effect may be made in public orders, or the warrant, or a copy, may be laid before the court. Officers commanding regiments and detachments are empowered to assemble regimental and detachment courts martial without other authority than the articles of war.

494. When not specified in the order for the assembly of the court or in the president's warrant (which, it may be observed, [§ 273] is no longer the practice), it is proper at this stage of the proceedings to read either the charge signed by the convening officer himself, or "by order" by an officer of the head quarter, brigade or regimental staff, according as it may be a general, district, or regimental court martial; or the authority for a prisoner being tried on the charges preferred against him; or for the court entering on any other enquiry, as the case may be, and the court

(7) See Form, Q.R. App. B.(1) fallen into disuse before the new form of warrant omitted the words which seem to have originally contemplated this formality.
[§ 273]. The custom of reading or laying before the court the warrant (or a certified copy) giving authority for the convening had for the most part

thus has formally brought before it the *matter* touching which they are about to swear that they will duly administer justice.

495. After reading the orders for the assembly of the court and the trial of the prisoner, and the warrants of the president and judge advocate, when they are appointed by warrant, and not in orders, the names of the president and the other officers appointed to serve on the trial are read over in the hearing of the prisoner, each officer answering to his name. The president at all (8) courts martial then asks the prisoner, (9) or if several are tried together asks each one separately, Do you object to be tried by me as president or by any of the officers, whose names you have heard read over?

After the warrants and orders are read,

and the members have answered to their names, the challenge is proffered to the prisoner.

496. A prisoner cannot challenge *the court generally*:—until sworn in, it is not competent to decide upon questions in the nature of pleas in bar of trial. Nor can a prisoner challenge the whole of the members collectively, but he has a legal right to object to every individual member composing the court. The prisoner also may object to the composition of the court, [§ 18-29, 304] for defect in rank, or otherwise.

The prisoner may object to individual members, or challenge the composition of the court.

497. Should the prisoner object to the president, the objection to him is made, and, together with the evidence, recorded on the proceedings, in the same manner as on the challenge of any other member. (10) It cannot however in like manner be disposed of by the court, except when it is disallowed by two-thirds at least of the other officers appointed to form the court. When a larger minority than one-third desire to refer it, or when the objection appears well founded, it is referred to the decision of the authority by whom the president was appointed, the court separating

Challenge of president referred to the superior authority:

(8) See question by president. Q.R. App. B,(1).

(9) Qualified challenges, both by the prisoner and by the judge advocate or prosecutor on the part of the crown, were formerly allowed. As the mutiny act now expressly provides for the exercise of the right of challenge by the prisoner, and does not mention challenges on the part of the crown, it is a question how far these last may be admissible.

With respect to challenges on an appeal from a regimental court of enquiry, there is not the same difficulty,

as the provisions of the mutiny act extend only to the trial of prisoners, and in no way affect the previously established custom of allowing challenges on the part of either party to the appeal.

(10) There is no order for the president to withdraw, but he is at liberty to adopt this course. On the trial of Private James Keilly, 53rd Regiment, at Dublin, 16th June, 1866, he objected to the president. The prisoner having stated his objection, "the president retires and the court is closed."
—*Proceedings of Trial.*

of any other member, decided by the remainder of the court.

Course adopted when two or more officers are challenged.

The place of officers who are set aside,

supplied by other officers,

who are subject to challenge.

Challenges peremptory unknown, the

for that purpose. (1) No steps are taken with respect to a challenge of any other officer, so long as an objection to the president has not been disposed of. If the prisoner objects to any officer other than the president, the objection is decided by the president and the other officers appointed to form the court. When their votes are equally divided, the decision is given in favour of the challenge being allowed. Where a prisoner challenges more than one officer, he is required to state his objections to each of them separately, and in the order of their rank, and the objections are considered one by one, and the decision made known before entering upon another. (2)

498. When the whole of the objections have been gone through by the court, the officers, in respect of whom challenges may have been allowed, are replaced at once from the officers in waiting. When no officers have been put in orders for this purpose or an insufficient number, further proceedings must be suspended until officers are obtained to make up the number of which the court may have been originally composed. Should any inconvenience attend the supplying of the vacancies, if the legal minimum still remain, it rests with the superior authority to dispense with the swearing in of the additional number. [§14, 526]

499. Should a fresh president be appointed he is of course subject to challenge, as are also the officers who may supply the place of those in respect of whom objections may have been allowed by the court: (3) the judge advocate, as before observed, [§465] is in no case challengeable.

500. Peremptory challenges, or challenges "without showing of any cause," are not known to courts martial;

(1) A.W.152. These provisions apply to every description of court martial, and were first inserted in the mutiny act of 1847, which fixed what had gradually become the prevailing practice of the service.

(2) There is no express regulation on this subject, but the form appended by the writer to former editions of this work has been embodied in the new issue of the Queen's Regulations, which may therefore be taken to sanction the

course here suggested. When several officers are challenged, the above had been the general practice.—It appears to be calculated to obviate inconveniences in every case, and some expedient of the kind must necessarily be resorted to, in the event of every member being challenged, an incident which has occurred, and on more than one occasion.

(3) A.W.152.

the prisoner must in every case state his objection, which together with the statement of any witnesses, is entered on the minutes of the court, as other parts of the proceedings. The cause of exception having been detailed and a reply or explanation offered, if the case admits of it, and that also having been entered on the face of the proceedings, the court is cleared, and the other officers proceed to deliberate and decide on the assigned cause of exception. The court, it may be observed, must decide on the *assertion* of the party challenging, of the officer challenged, and of the witnesses examined; for it has no authority to receive evidence on oath, before the administration of the prescribed oath to the members. The better practice of the service has prevailed, and it has become the established custom for the member, in respect to whom the objection has been made, to withdraw on the clearing of the court. In general, an officer, objected to on the score of prejudice or malice, requests permission to withdraw altogether, and the court ordinarily feels disposed to assent, when it can do so consistently: Sir Edward Blackstone has well remarked, that upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may provoke resentment. (4)

prisoner is called on to state his objection; which is also entered on the face of the proceedings.

How disposed of by court.

501. The other officers having come to a decision as to the allowance of the challenge, and the officer whose case has been under consideration being aware of the result, the parties are called into court and the public is admitted. The decision is then made known in open court, and the officer objected to either retains his seat, or else, except in the case of an exception to the president not being disallowed, [§497] is set aside in order to being replaced, as above pointed out, by some other officer.

Decision as to challenge made known in open court.

502. Challenges to particular jurors have been reduced by lawyers to four heads: *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*. No question, connected with the first class, can arise for consideration by a court martial, and it would be difficult to imagine a case to be classed under the fourth. It is possible, however improbable, that challenges may arise, depending

Cause of challenge

defect in rank ; on the second class ; as if, by inadvertence, an officer, under the degree of captain, were about to take the oaths and proceed to the trial of a field officer ; or, on a general court martial, an officer who had not held a commission for three years, or if a young officer were nominated a member of any other court martial, without having previously attended the proceedings of courts martial. (5)

defect from
inexperience ;

prejudice or
malice.

503. The most frequent causes of challenge,—or rather the least infrequent,—fall under the third head ;—for suspicion of prejudice or malice. It is unnecessary, even were it possible, to enter with minuteness on this subject. The grounds of challenge are necessarily the same in all courts, but they depend entirely on the facts of the particular case and the view the court may take of them. Each cause of prejudice must vary in complexion and degree, and can only be decided by the opinion of the members of the court martial, in whose breast it is to distinguish that degree of prejudice or malice which may justify the objection to a particular member.

Principal
causes of
challenge of
jurors ; *propter
affectum*,

may apply in
most cases of
courts martial ;

504. According to Blackstone, *principal* challenges of jurors challenged for suspicion of bias, or partiality, are, “where the cause assigned carries with it, *primâ facie*, evident marks of suspicion, either of malice or favour ; as, that a juror is of kin to either party within the ninth degree ; that he has an interest in the cause ; that there is an action depending between him and the party ; that he has taken money for his verdict ; that he has formerly been a juror in the same cause ; that he is the party’s master, servant, counsellor, steward, or attorney, or of the same society or corporation with him : all these are principal causes of challenge, which, if true, cannot be overruled ; for jurors must be *omni exceptione majores*.” (6) Now, the greater part of these causes of principal challenge may arise on courts martial ; and it cannot be questioned that it is equally necessary as on juries, that members of a court martial should be *omni exceptione majores*. Still, however, it must be borne in mind, that there is not an equal facility of replacing a member of a court martial and a juror in an ordinary trial ; and that great inconvenience to the service, if not a failure of

(5) Q.R.S.6,p.48. See § 12n.

(6) 3 Commentaries, 363.

justice, must often arise if frivolous causes of challenge were admitted.

505. The having declared an opinion unfavourable to the prisoner *maliciously*, is a good cause of challenge; but if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge. (7)

having delivered
opinion of
prisoner
maliciously,

506. A jurymen has been set aside on a trial for high treason, because, when looking at the prisoners, he uttered the words "*damned rascals*:" (8) and such ground of challenge would, no doubt, avail against a member of a court martial. The having expressed an opinion of the prisoner on the charge in question, is held sufficient ground of exception:—"In the year 1718, an officer was tried by a court martial at Gibraltar, for killing another; the prisoner challenged two of the members; the first, for tampering with one of his witnesses; the other, for declaring before the trial came on, that he deserved to die: both were proved, and admitted by the court to be just and reasonable exceptions; whereupon they were both dismissed, and others sworn in their room." (1)

or on the crime
charged;

507. In December, 1828, a soldier of the 85th regiment was brought to a court martial for attempting to steal the property of an officer, who by inadvertence was appointed a member of the court. The prisoner was found guilty; but, on the opinion of the judge advocate general, the sentence was remitted, from the circumstance of the officer, to whom the property belonged, being a member.

member
interested or
injured;

508. Before the alteration of the law, [§317] on appeals from a regimental to a general court martial, the having been a member of such regimental court martial was held a sufficient cause of exception, and the same holds good as to members of the court of enquiry. [§512]

having been
on regimental
court of enquiry
appealed from.

509. The objection, that the member is of the same regiment or company with the prisoner, or of the same regiment with the president, is inadmissible.

The being of the
same regiment
or company
with prisoner,
inadmissible.

510. A commanding officer of the prisoner's regiment, *as such*, has been objected to, and the validity of the challenge admitted, possibly upon the supposition that prejudice might

Commanding
prisoner's
regiment.

(7) Hawkins, p. 589.

(8) *State Trials*, O'Coigly.

(1) *Simes's Military Library*, iv. 64.

exist from previous imperfect, or *ex parte*, knowledge of the circumstances inducing the trial. The mutiny act and articles of war formerly rendered (2) the commanding officer of the prisoner's regiment ineligible as president as such, and an opinion has been given on the highest authority, that a prisoner's commanding officer sitting on the court martial for his trial, although not rendering the sentence invalid, is an "inexpedient proceeding." If the commanding officer had taken an active part in promoting the prosecution, or in bringing forward the charge, his sitting as a member would be highly objectionable in any circumstances; and if alleged as a cause of challenge, should obviously be allowed.

Material
witness ;

511. It is a valid cause of challenge, that a proposed member is a material witness and summoned on the trial; but if required to give evidence as to character only, the objection is not admitted. (3) If a member, not having been challenged, shall have taken the oaths and his seat, and shall in the course of the trial be examined as a material witness, he is not thereby disqualified from discharging his duty as a member of the court martial. [§ 947] Circumstances may, however, render it a subject of regret that the duties of a member and a witness were united. Should the cross-examination be calculated to create irritation in a member, it must be more consonant with his feelings, and may probably be more accordant with the practice of judges in the civil courts, were he not to resume his seat; but even if the members were in excess of the *minimum* number, so long as the law does not make provision for such withdrawal, it would be as illegal as for a jurymen to leave the box before the verdict, because he had been sworn as a witness.

having been
a member of
a court of
enquiry on
the subject of
charge :

512. An officer's having been a member of a court of enquiry held to investigate the subject of the charge, the court having given an opinion, is allowed to be a valid cause of challenge. It is generally held that the objection is equally valid where the court has *not* given an opinion,

(2) See the existing provisions, § 16.

(3) "It seems agreed that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him; and in the case of Hacker, two of the persons in the commission for the trial came off

the bench, and were sworn, and gave evidence, and *did not go up to the bench again during his trial.*"—2 Hawkins, 608.—Peers examined as witnesses on the trial of peers take part in the subsequent verdict.—Taylor, 1197.

although a contrary position has been maintained by a well-known writer on this subject. (4) It will be granted without difficulty that a judge or juror ought, as far as practicable, to enter upon the investigation of a charge without prejudice, and without the bias which *ex parte* statements are calculated to create. Now, the proceedings before a court of enquiry may be, and generally are, *ex parte* statements, tending to attach criminality, or to discover facts upon which subsequent charges may be built, and they are not upon oath. If the accused be permitted to enter on explanation, the statements in his favour are equally without the sanction of an oath, which the custom of all courts of justice, and the statute law as to courts martial, render necessary. It would therefore, it is apprehended, be quite incompatible with a fair and equitable trial, that a member of a court martial should be thus exposed to the impression of formal statements not on oath, and not tested by cross-examination.

513. There is another point nearly allied to this, respecting which the author of this work took a view of the custom of the service diametrically opposed to that of the author above referred to. He specified "the having been a member of a general court martial, in which the circumstances about to be investigated have been discussed, either principally, collaterally, or incidentally," as a "sufficient exception to a member objected to;" (5) and this on the ground, "that members of a court martial should come to a trial as little acquainted as possible with the subject to be tried, and perfectly free from every bias and impression which a previous discussion of its merits, however incidental, could not fail to leave on the member's mind;" and yet it is asserted, as before observed, [§ 512] that the objection to an officer's having been a member of a court of enquiry cannot be allowed, if the court had not given an opinion.—A collateral or incidental mention on oath, or a discussion resting on facts supported by legal evidence in the course of a regular trial, is therefore considered more calculated to create prejudice and poison the stream of justice than an *ex parte* or declamatory statement not on oath. Although the reasoning cannot be acquiesced in by which a

having been a member on a collateral trial, not in itself a valid cause of challenge.

(4) Kennedy on General Courts Martial (London, 1825), 20.

(5) Ibid.

having been a member on a collateral trial, not in itself a valid cause of challenge.

distinction is drawn between officers who may have served on courts of enquiry *giving* and *withholding* an opinion, yet it is not difficult to trace the probable origin of this notion. Mr. Tytler, adverting to the common law, and the affinity which courts of enquiry bear to grand juries, observes, "No grand juror, who has found a bill of indictment against a prisoner, can be a member of the petty jury on the trial of that prisoner, or even on the trial of another wherein the same matter is in question;" (6) and thence he infers, "that it is sufficient ground for challenging a member of a general court martial, that he has given his opinion of the cause in a previous court of enquiry." But Mr. Tytler does not add, that it is an insufficient cause, if the court of enquiry did not give an opinion; and he might have gone on to state, that no grand juror, having ignored a bill against a prisoner, can be a member of a jury on the trial of *that prisoner for the same charge*; and that, under all possible circumstances, it is a good cause of challenge that "a juror has formerly been a juror in the same cause." (7) Thus far the custom of civil courts tends to confirm the custom of courts martial here contended for,—that the having been a member of a court of enquiry is a sufficient objection, and this, whether an opinion shall have been given or not. The reason seems to be found in the possibility of the juror's being led to a premature opinion from incomplete and *ex parte* evidence. But though the custom of courts of civil judicature must have great weight in justifying the customs of courts martial, and although the rules of evidence in courts of common law ought to be admitted by courts martial as being the *law* of evidence, yet, in matters relating to the constitution of the court and to the ordering of its proceedings, courts martial must be guided by their own peculiar customs, which, when they differ from the ordinary forms in courts of common law, may generally be traced to peculiar circumstances incidental or inseparably attaching to courts martial.

514-9. But even if the analogous custom of common law courts were admitted as paramount authority, it is still to be shown that such analogy can be established as will support

(6) Tytler.

(7) Blackstone, 363. See before, §504.

the position, that "having been a member of a general court martial in which the circumstances about to be investigated have been discussed either principally, collaterally, or incidentally," is a sufficient objection. We learn from Hawkins that "It hath been adjudged to be no good cause of challenge, that the juror hath found others guilty on the same indictment; for the indictment is, in the judgment of the law, several against each defendant, for every one must be convicted by particular evidence against himself." (8) We read also, that where several are indicted jointly, but put separately on their trials, a conviction of one by a jury is no cause of challenge to the other prisoners, for the crime of each is several. (9) But—quite apart from any weight which may be derived from these rules of common law courts—it may be confidently asserted that nothing is more common or better established by custom, than for the same court martial, or rather, as they are resworn, courts martial composed of the same officers, to investigate charges, not only collateral, but arising out of the same facts, and even identical. Were it known and invariably admitted, that challenges to officers so circumstanced were allowed, they would, it is believed, be often resorted to to the prejudice of the service and to defeat the ends of justice. In many situations courts martial are with difficulty assembled, and it would be often the next thing to impossible, if not absolutely impossible, to furnish a different set of officers on collateral trials; and hence it is, that the right of arbitrary challenge, "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous," (10) cannot be permitted before courts martial.

having been a member on a collateral trial, not in itself a valid cause of challenge.

(8) 2 Hawkins, 589. (9) Kelynge, 9. (10) 4 Blackstone, 353.

CHAPTER XIV.

FORMATION, ADJOURNMENT, AND DISSOLUTION OF THE COURT.

Formation of the court.	520. If no challenges have been made, or after all have been disposed of, the court must first be duly formed by being sworn in, [§ 440-2] before proceeding with the trial.
Swearing of the court.	The prisoner, prosecutor (but not necessarily the witnesses), being present, the court and all persons who may be seated in the place of assembly stand, and the judge advocate proceeds to administer the oaths prescribed by the articles of war, [§ 440, 451] to the president first, by himself, as a mark of respect, and afterwards to the members collectively, or to as many of them as may conveniently together hold the book. The president then administers the oath of secrecy to the judge advocate and officers attending for instruction, and the officers in waiting are relieved from further attendance.
Oath administered, first to president; to members collectively; to judge advocate.	521. In all cases in which more prisoners than one are arraigned upon separate and distinct charges, and tried by the same court martial, it is directed that the court be re-sworn at the commencement of each trial, and that the proceedings should be conducted and recorded separately. (1)
Court re-sworn on the trial of each prisoner.	522. A court martial once constituted by competent authority continues in existence till dissolved by the same superior authority; but in the case of a court martial held in India on an officer or soldier of the Indian forces, the government of the presidency may suspend the proceedings. (2) If, when charged to try a prisoner, it has proceeded with the arraignment, it cannot be dissolved without pro-
Court exists till dissolved,	
except in Indian army,	

(1) Q.R.App.A.1. Examples of not re-swearing a court composed of the same officers were not uncommon before the appearance of the order to this effect, though the terms of the adjuration, "You shall well and truly try and determine according to the evidence in the matter now before you," would seem to have always required the repetition of this oath in each separate case.

(2) M.A.100. This provision was

transferred to the mutiny act of 1863 from the Indian mutiny act of 1847 (20 & 21 Vict. c. 66, s. 57), which was repealed that year. The corresponding section was first inserted in the East India Company's mutiny act of 1823 (4 Geo. 4, c. 81, s. 14), and it was supposed to have been suggested (*see* McNaughten, p. 66) by an unfortunate dissension between the civil and military authorities at Madras in the year 1809.

ceeding to judgment, except the prisoner should be released, by order of the convening authority, or in case of the death or protracted illness or capture of members reducing it below the legal number. The illness of the prisoner, if it promise to suspend the proceedings of the court, to the serious prejudice of the service, may also justify its being dissolved, the prisoner remaining liable to future trial.(2) Should the death of the prisoner put a stop to the trial, the fact must be established by evidence, and recorded before the court is finally adjourned.

unless the members die, are taken prisoners of war, or become incapacitated by illness.

523. The place of meeting of the court may at any time be changed in accordance with the order of the convening authority; or, within the limits of the original order, the court may adjourn on its own motion, or at the suggestion of either prosecutor or prisoner, to the place of any transaction referred to in the evidence before it, for the purpose of comparing the plans which may have been produced, or otherwise becoming acquainted with the locality; (3)—or to take the examination of a witness unable to attend the court; [§ 941] or upon other similar occasion. (4)

Change of place of assembly.

524. No proceedings can take place but between the hours of eight in the morning and four in the afternoon, or in the East Indies, between six in the morning and four in the afternoon, except in cases requiring immediate example.(5) Evident necessity will in like manner justify a deviation from the well-established custom of the service by the sitting of a court martial on Sunday, Christmas-day, or Good Friday. (6) In 1868 the article of war provided

Time of proceeding;

extended.

(2) See § 534. General courts martial have in many cases assembled at the quarters of the prisoner (an officer), when he was unable to attend. A similar course was adopted some years since in the case of a soldier who had been reported sick during the trial. The court at his request, after consulting the medical officer, adjourned to the ward of the hospital in order to receive the evidence of a witness for the defence, whom it was desirable to release from further attendance.

(3) On the 3rd October, 1866, the court for the trial of Ensign Cullen proceeded in H.M.S. Barracouta to Port Mourant, and thence to the scene of the alleged offence.—*Blue Book*, p. 4. The prisoner, under escort

of an officer, accompanied the court and the observations of the court were recorded on the proceedings. See § 429 for the new provision added to the articles in 1868.

(4) See § 522*n*. "At the request of the prosecutor, the court, accompanied by the prisoner, proceeded to the engine house in the barracks, and viewed the bones of the three human bodies there laid out."—Trial of Ensign Cullen, *Jamaica Blue Book*, p. 44.

(5) A.W.160.

(6) In the case of a general court martial the royal warrant (R.W.165) authorizes the payment of the usual allowances on the intervening Sundays during the sitting of the court.

that if the court considers it necessary, they may continue any trial beyond the hour of four in the afternoon, recording in the proceedings their reason for so doing.(7) It was also provided in the article for the year 1872, that in addition to cases requiring an immediate example, trials may be held at any hour when the commanding officer certifies under his hand that the same is expedient for the public service.

Adjournments.

525. The court adjourns, from time to time, upon the order of the president; the time when the court adjourns and assembles being recorded with precision, in order that it may appear on the face of the proceedings to have been held during the appointed hours. When the duration of an adjournment is dependent on circumstances, and the court cannot fix the day, it is re-assembled by a notification to that effect in orders, or by notice to each member from the officiating judge advocate. When a court martial is not sitting, the members are available for parades or other duties that will not interfere with their court martial duty; but they are not to quit the station without special authority until the court is dissolved.(8) It was pointed out in former regulations, that in case of any pressing necessity, a reference should be made, if at home, through the adjutant general, or, if on foreign stations, to the general officer commanding, before the members are permitted to go beyond the reach of a call for the re-assembling of the court.(9)

Liability of members to other duty, during, but not to embark, or go away on leave,

except in special cases.

Desirable to swear more than least legal number.

Court reduced below the legal number, by sickness, may adjourn.

526. On general courts martial at all times, and more especially when there is a prospect of protracted proceedings, and in this case also on minor courts martial, it is desirable that a number, exceeding that legally necessary, should be sworn in, to guard against the inconvenience which might otherwise arise from the sickness or death of a member. If, by the absence of a member, the court should be reduced below the legal number, it necessarily adjourns: if the legal number remains, the trial is proceeded with. In either case the absence, with the cause, is duly recorded. If it be the sickness of a member, proved by the evidence of a medical officer, the court may adjourn, either from time to time, or leaving the time of meeting to be announced, as above men-

(7) A.W.160. (8) Q.R.S.S.p.4. (9) Gen. Reg. (1837), page 247.

tioned, [§ 525]; but if the number be reduced below the minimum by the capture or resignation being officially notified, (10) or by the death of a member, the court is from that moment dissolved, so far as the particular trial is concerned, the fact being noted at the end of the proceedings, and reported by the president to the convening authority.

Is dissolved by member dying or becoming prisoner of war.

527. When the court is dissolved by being reduced below the legal minimum as above, or if the illness of any one of its number be so serious as to render necessary such an adjournment as may prove inconvenient to the service, it is competent to the convening authority to declare the court dissolved, and, in either case, provided the court had not proceeded so far as to give judgment, another court may be assembled for the trial of the prisoner. The mutiny act only provides against second trials of persons "acquitted or convicted." Those of the members of the former court, who remain available, may be appointed to serve on the new court, but they must, with the additional officers, be subject to challenge. The whole of the proceedings, the swearing of the court, the swearing and examination of witnesses, &c., must be gone through *de novo*. This course, not only accords with the ordinary proceedings of courts martial and the express opinion of the able judge advocate, Mr. Manners Sutton, (1) but is in strict conformity with the practice of the superior courts of law, on the sudden illness of a juror. (2)

Judgment not being pronounced,

a new trial may be ordered, but

all proceedings must be *de novo*.

528. It has however been held, that new members may be *added* to a court martial, if "such persons hear or be well informed of the evidence given before their attendance;" (3) and others again have asserted, that such proceeding would

New member cannot be sworn on a court martial,

(10) Officers who retire, when serving at home, receive pay to the day before that specified in the *Gazette* (R.W.219), and, if serving abroad, to the date on which the retirement is notified in the general orders of the station, if they continue to do duty.—R.W.221.

(1) The opinion of Mr. Manners Sutton, referred to, was given in a case where an officer had been placed on his trial and the prosecution far proceeded with, when the illness of a member, by reducing the court below the legal number, interrupted the pro-

ceedings; and the delay, occasioned by referring to the judge advocate general, was productive of an arrangement of the affair, in consequence of which the prisoner was released from arrest and returned to his duty; it is for this reason that names and dates are not given.

(2) Scaldert's case, 2 Leach, 707.

(3) Opinion of the king's advocate and solicitor of the admiralty, Messrs. G. Paul and W. Strahan. 1 M'Arthur (3rd edit. 1806), Appendix xv.; but this appendix was omitted in the 4th edition (1813).

even with consent of prisoner.

Consent of parties not to affect the constitution of court ;

may influence the admission of evidence.

Casualty to president ; the next senior member may be appointed.

Absence of member, during reception of evidence, prevents his return.

be correct, if assented to by the prisoner. But it is directly contrary to common law to admit a new juror, and equally opposed to the custom of courts martial to admit a new member to take his seat during the progress of a trial—as much so and for the same reasons as it would be to permit an original member, who had been absent during the examination of a witness, to resume his. In civil courts the law recognizes the consent of parties as in certain cases justifying a deviation from the ordinary course, but never in criminal trials, which all trials by court martial are held to be. Were it otherwise, any other irregularity, and innovations of every kind, might be justified by the consent of the parties before the court. The court is sworn to abide by certain fixed rules, not to arbitrate between the parties on any terms to which *they* may agree, and, it is conceived, ought not to permit the concurrence of the prisoner, or parties to the trial, to influence any proceeding which may affect its constitution. The utmost extent to which the *consent* of the parties might operate should apply only to any relaxation or modification of the strict rule as to the admission of evidence. [§ 990-1] If this be admitted, it must be granted, that on the addition of a new member, the court ought invariably to be resworn after having been again subject to challenge; but, when the court is duly constituted, if, to save time, the prisoner think fit, and the prosecutor do not object, there can then be no objection, after each witness has been again sworn, to admit the reading over to him, and the entering on the proceedings of his previously recorded testimony, with any alteration he may desire, the witness also being subject to examination by the court and to be again examined by the parties before it.

529. Should the court be deprived of the president, the convening authority is competent to appoint the next senior member to that office (if he be eligible under the provisions of the articles of war), provided the number of the members still remaining is legally sufficient. In such case, the proceedings would continue as though no interruption had occurred, the warrant or order appointing the new president being read and entered.

530. As it is essentially necessary that the examination of witnesses should take place in the presence of all the members of the court, and as, in fact, no act performed by a part

of the court can be legal, the unavoidable absence of any member, by sickness, or otherwise, at any period necessarily prevents his resuming his seat. (4) A failure in attention to this custom, which has ever prevailed, so far as the author can ascertain, in the British army, was strongly animadverted upon by General Viscount Combermere, in a general order, dated Simla, 17th September, 1828, on the proceedings of a general court martial held at Dinapore, for the trial of Lieutenant E. Reily, of the 13th Light Infantry: "It appears that, on the court assembling on the sixth day, one of the members was taken ill and obliged to withdraw; a sufficient number remaining, the court proceeded in the hearing of evidence for the defence. On the next day of assembling, the member who had withdrawn was allowed to resume his seat. This proceeding is so directly at variance with the practice of courts martial and the principles of justice, that it may be held to affect the legality of the judgment of the court." His lordship, after commenting on the finding, continues,—*"The irregularity, before observed, has rendered nugatory the sentence of the court martial."*

531. It can scarcely be necessary to remark, that the occasional withdrawing of a member for any time, however limited, must suspend the examination of a witness; that, which is in itself unjust and irregular, must be so if tolerated in any degree.

Proceedings
suspended
during momen-
tary absence
of member.

532. The absence of the judge advocate, who may have been sworn in at the commencement of the proceedings, does not invalidate the proceedings of a general court martial. A substitute may be appointed by the judge advocate general, or by the officer convening the court, where the warrant includes the power to appoint a judge advocate. The person appointed to officiate must obviously be sworn, and it must be entered on the face of the proceedings, that the warrant or order appointing him, has been read in court. The reasons which debar the return of a member, who may have been absent during the reception of evidence, do not

Judge advocate
may be relieved
in the course
of trial,

and resume
his duties.

(4) See a remark by the King in the general order, 20th December, 1806, publishing the sentence on Quarter-master Heady, 3rd Dragoon Guards. [§ 617] One exception to the spirit of this rule may be justified by the

letter of the 160th article of war, under which the convening officer may direct some member only to have a view in order to the better understanding of the evidence upon the trial.—Sec § 429.

apply to the judge advocate; he may resume his duties at any moment.

Trial may be
put off,

on score of
absent witness;

533. Application to delay the assembling of the court, from the absence or indisposition of witnesses, the illness of the parties, or other cause, should be made, when practicable, to the convening authority; but application to put off or suspend the trial, may be urged with a court martial, after the members are sworn. [§534] It may be supported by affidavit, and to prevail on the score of the absence of the witness, the court, who may call upon the opposite party for any observations upon the application, (5) must be satisfied that the testimony proposed to be offered is material, and that without it (6) the applicant cannot have substantial justice. The points, therefore, which each witness is intended to prove, must be set forth in the application, and it must also be shown that the absence of the witness is not attributable to any neglect of the applicant. A precise period of delay must be prayed for, and it must be made to appear that there is reasonable expectation of procuring the attendance of the witness by the specified time (7); or, if the absence of a witness be attributed to his illness, a surgeon, by *vivâ voce* testimony on oath, or by affidavit, must state the inability of the witness to attend the court, the nature of his disease, and the time which will probably elapse before the witness may be able to give his testimony.

when further
evidence is for
the furtherance
of justice,

534. It is now expressly laid down in the Queen's Regulations that, "The court have the power of granting an adjournment, but they should in no case permit an adjournment for the purpose of obtaining further evidence, either on behalf of the prosecution or of the prisoner, unless they are satisfied that such adjournment and production of the evidence desired is not unjust to the prisoner, and that it is necessary to assist the course of justice. Great care is therefore to be taken, both by the prosecuting officer and the prisoner, to have ready at the trial all the witnesses and

(5) Trial of Ensign Cullen, p. 1.

(6) "I take it not only on precedent, but in common justice, a greater latitude has always been given in the procuring witnesses material for the defence, than those thought material for the prosecution."—*The judge advocate general (Mr. Manners Sutton),*

Col. Quentin's Trial, p. 35.

(7) "I do not know of any instance of the court being adjourned to an indefinite period, for the attendance of a witness, whose attendance they could not compel."—*Mr. Manners Sutton, ibid.*

documents that they may desire to produce in support of their respective cases." (1)

but occasion ought to be provided against.

535. The court must obviously be adjourned at any period of its proceedings, prior to the final close of the prosecution and defence, on satisfactory proof by one or more medical officers that the prisoner is in such a state that actual danger would arise from his attendance in court. The medical officer is required to state the time when in his opinion the prisoner will be able to appear before the court, and where he is so ill as to render it probable that his inability to attend the court will be of such continuance as to operate to the inconvenience of the service, either by the retention of the members of the court from their regiments, or from other cause, the court may be dissolved by the convening authority, though the prisoner may have been arraigned and the trial have been proceeded with. The prisoner, on recovery, as in other cases where the court has not proceeded to the finding, is amenable to trial by another court martial.

Sickness of prisoner;.

which, in certain cases, may justify dissolution of the court,

prisoner being amenable to subsequent arraignment :

536. On the trial of Ensign Cullen, when the prosecutor was assisted by the attorney general of the colony, the court adjourned in order to allow the prisoner to obtain the assistance of counsel, after having received the evidence of a witness on oath, who was examined in support of the statement in the prisoner's application as to the unavoidable absence of his professional adviser. (2)

Absence of prisoner's professional advisers.

537. The illness of the prosecutor would, in few cases, justify the suspension of the trial, excepting perhaps for a very limited period. All prosecutions before courts martial are considered as being at the suit of the crown, and another officer might be required to perform the duty.

Illness of prosecutor.

538-49. With reference to the dissolution of courts martial, and to the mode of keeping the roster for court martial duty, it may be observed that the Queen's Regulations direct, that attendance at a court martial, the members of which shall have been assembled and sworn, is to be considered a duty, though the court shall have been dissolved without trying any person. (3) An officer detailed as "in waiting" does not count a tour of duty. (4)

A court martial once sworn, counts as a tour of duty.

(1) Q.R.App.A,p.2.

(2) Jamaica Trials, p. 1, p. 107. The court for the trial of the Missionary Smith (Demerara, 1823), adjourned to

enable him to procure the assistance of counsel. See also the course pursued at the Fenian trials in Dublin. [§ 475]

(3) Q.R.S.8,p.3. (4) Q.R.S.8,p.4.

CHAPTER XV.

OF THE TRIAL AND ITS INCIDENTS.

THE TRIAL.

The forms
how calculated

to ensure fair
play.

Charges read.

Prisoner
arraigned.

550. THE court having been sworn, the actual trial begins; and here attention may be drawn to the principle that underlies the several forms in trials before courts martial. Although they are essentially different from our ordinary criminal courts, both in their constitution and the circumstances in which they are held, they have this in common with every other form of English criminal procedure. The trial, although a public enquiry into a matter which concerns the public service, is nevertheless conducted as a private litigation between two parties. The prosecutor tries to prove the liability of the prisoner to punishment for an alleged offence, and the prisoner tries to disprove it; the court, as it were, moderating between them, according to certain rules which have grown up in practice, and been found by experience to promote the ends, not only of abstract justice, but also of what Englishmen value almost more, and best understand as "fair play." (1) First of all, the charge is read, in open court, to the prisoner, whom the president, or judge advocate, at his desire, proceeds to arraign, by addressing him by his rank and name, (2) as specified in the charge, and to the following effect: 'Are you guilty or not guilty of the charge, (or charges,) against you, which you have heard read?' Where two or more prisoners are tried, [§ 402] each is separately arraigned in like form in the order in which their names stand in the charge. "It is generally [§ 569] advisable

(1) For a very interesting discussion of the comparative merits of the English "litigious" and the foreign "inquisitorial" criminal systems, see Stephen's *Criminal Law of England*, 153 168.

(2) It was formerly the etiquette to address prisoners before military courts martial as *prisoner*; and the custom is still, it is believed, rigidly retained in the navy.

that the witnesses be ordered out of court at this stage of the proceedings." (3)

551. Courts martial [§ 457] taking exception to a charge, or the terms of it, before the arraignment of the prisoner, must defer calling on him to plead, and adjourn, reporting the proceeding through the president to the officer by whom the court may have been convened. With the exception of mere clerical corrections [§ 389] the court has no authority to proceed with the trial on altered charges, unless their amendment has been sanctioned by the convening authority.

552. Whatever plea a prisoner may make, it is recorded on the proceedings; he either pleads guilty or not guilty;—the plea must be express, simple and unqualified, as no exculpatory matter can, in this stage, be received; no *special* justification can be put in by way of plea; it would be to anticipate the defence:—or he stands mute, that is, makes no answer at all, or answers foreign to the purpose:—or instead of putting himself on his trial by a plea of *not guilty*, or acquiescing in its being recorded for him, he may offer certain pleas in bar of trial. (4)

553. A plea of guilty is in law a conclusive admission by the prisoner of his guilt, and further evidence is not required for the purpose of proving the charge. "Before recording a plea of *guilty*, the court will satisfy themselves that the prisoner fully understands all the advantages he forfeits by that plea. Whatever the plea may be, however, it is incumbent on the court to investigate the charge, so that all the circumstances connected therewith may be known to the confirming authorities." (5) Formerly, if a prisoner pleaded guilty, the court, adopting the custom of common law courts, proceeded at once to pass sentence, as in the case of Lieutenant Kersteman, Royal Artillery, who was tried at Rosendaal, in 1814. (6)

554. A plea of guilty is held neither to preclude the pro-

Witnesses ordered to withdraw.

Court, taking objection to charge, adjourns and reports,

having no authority to amend the form or substance of the charge.

PLEA.

Guilty, or not guilty :

none offered.

Special in bar.

Plea of guilty.

Prisoner pleading guilty, may

(3) Q.R.App.B.(2) Instruction 1.

(4) As to objections to the charge, in the nature of pleas in abatement, see before, § 389.

There is another plea (distinguished, in civil courts, as a demurrer); it admits the truth of the facts charged; but issue is joined upon some point of law, by which it may be insisted that

the fact, as stated, is no mutiny, no disobedience of orders, no conduct unbecoming the character of an officer and a gentleman. This plea is not admitted at courts martial, but a similar defence may be made with equal advantages on a plea of not guilty.

(5) Q.R.App.A.p.5. See § 1005.

(6) G.O.333. See also G.O.338

make a defence
and cross-
examine.

duction on the part of the prisoner of evidence as to *fact* as well as *character*, nor to be a bar to his addressing the court on his defence in extenuation of the offence or in mitigation of punishment. Upon the same principle, although an impression to the contrary has not been infrequent, a prisoner pleading guilty is not debarred from cross-examining the witnesses for the prosecution: a prisoner may plead guilty to the charge generally, and yet desire to alleviate the bearing of particular parts of the evidence brought against him, or to place his conduct, connected with such evidence, in a different point of view from that in which the examination in chief may have left it, and justice requires that he should enjoy this privilege. And besides this, a cross-examination may essentially tend to an elucidation of facts, and a knowledge of circumstances, to ascertain which, for the information of the confirming authority, is the express object of proceeding with the trial.

Standing
mute.

555. A prisoner who stands mute, does so, either obstinately, or by visitation of God. (7) In either case, the court is now required by regulation (8) to record a plea of "not guilty," and proceed with the trial. [§ 553] Formerly, courts martial, on a prisoner's standing obstinately mute or refusing to plead, proceeded, as on a plea of guilt, to pass sentence. At the trial of Assistant Surgeon Harrison, 17th Foot, at Ghazepoor, in 1816, the court, in passing sentence, specially declared, that they had no alternative, considering the prisoner's determined and repeated refusal to plead, but to pronounce him guilty. (9)

SPECIAL PLEAS.
Pleas in bar
of trial;

556. Pleas in bar of trial may be either—To the jurisdiction of the court, or—Special pleas in bar, as they are termed, in which the prisoner sets before the court a reason why he should not be called on to answer to the charge.

are now re-
cognised in the
regulations.

557. Until the issue of the Queen's Regulations of 1868, the allowance of special pleas in bar of trial depended on the custom of the service, and there was no established rule for dealing with them. The course here detailed, which

(7) Should a prisoner stand mute by the visitation of God, though the court proceed to trial as if he had pleaded not guilty, yet it is a point undetermined, whether judgment of death can be given against one who

had never pleaded, and who can say nothing in arrest of judgment.—4 Blackstone, 524.

(8) Q.R.App.A, 5.

(9) G.O.396.

had been suggested in former editions of this work in the absence of authoritative precedent, was then pointed out as that to be adopted. (1) If the special plea in bar of trial appears to be plausible, evidence, when necessary, is heard to the point; and if, on deliberation, the plea is allowed, the fact is recorded, the court adjourns, and the president submits the proceedings to the convening officer.

SPECIAL PLEAS.

If the plea in bar be valid, the court adjourns.

558. A prisoner before a court martial, who omits to offer pleas in bar on his arraignment, is not deprived of the advantage he might have derived under them, by the want of form, as the court may remedy it by their sentence.

Similar matter may be offered in his defence.

559. A prisoner, pleading to the jurisdiction, may aver that he is no soldier, or not amenable to a court martial—or that the act charged against him had not been declared an offence at the time laid in the charge;—or a soldier, —brought before an inferior court martial for a crime declared by the articles of war to be cognizable by a court martial of superior jurisdiction, without authority having been extended to the inferior court;—or, arraigned by a court not legally constituted, either as to the authority by which it assembled, or as to the number and rank of its members;—may for these, and similar causes, except to the jurisdiction of a court martial. It may also be pleaded in bar of trial, (or an objection may be taken to the warrant, which is the same in effect) that the offence charged has taken place more than three years before the issuing of the warrant for trial, unless the person accused, by reason of his having absented himself, or of some other manifest impediment, may not have been amenable to justice; in which case, the plea would be valid only, if time exceeding two years had elapsed from the period when the impediment may have ceased. (2) It appears from the remarks of the judge advocate and the proceedings of the court martial on Lieutenant Colonel George Johnston, 102nd Regiment, that, though the facts in issue should be charged to have happened more than three years prior to the date of the warrant for the assembling of the court martial, yet that it is not the province of the court, *no objection being taken to the warrant*, to enquire as to the impediment in the outset, and before

Plea to the jurisdiction:

Time charged beyond the retrospection of court.

(1) Q.R. Appendix, B,(2).

(2) M.A.97.

SPECIAL PLEAS.

the prosecutor proceeds with the opening address. It would be to presume the illegality of the warrant; whereas the court should assume, that manifest impediment to earlier trial did exist, and leave the facts to be developed by witnesses in the ordinary course. (1)

Former trial
for the same
offence.

560. A former acquittal or conviction of the same offence is obviously a valid bar to trial; (2) nor is there any exception as formerly, officers who have been acquitted or convicted by the civil magistrate being no longer triable by a court martial. (3)

Previous
punishment
for offence
charged,

561. Analogous to the defence of a former conviction is the plea, that the prisoner has been already punished for the same offence. This had always been allowed at courts martial, as respects both officers and soldiers, and it was expressly provided by the mutiny act, so long as it continued to specify the powers of commanding officers, (which, since 1860, have been conferred by the articles of war,) (4) that in the case of a soldier who had been guilty of any offence, which the commanding officer may not have thought necessary to bring before a court martial, and for which he had awarded any punishment he had authority to inflict, "that such soldier shall not be liable to be afterwards tried by a court martial for any offence for which he shall have been so punished, *ordered* to suffer imprisonment, punishment, or forfeiture." It has been ruled that summary deprivation of acting rank is a valid plea in bar of trial by a court martial for the offence so punished. (5) The cases where a soldier's pay is affected [§ 367], and he has a right to appeal to a court martial, instead of submitting to the summary award of the commanding officer, are an obvious exception.

or, in case of
a soldier,

order of
punishment,

deprivation of
acting rank,

unless he
appeal to a
court martial.

Previous
punishment
for offence
charged;

562. On the trial of Captain G. J. Hallilay, 10th Foot, the court, the proceedings of which were approved and confirmed by the King, expressly "declined to proceed upon the investigation" of the fifth charge, as it appeared that the prisoner had already been "severely punished, by having been put into, and kept in, arrest, for the offence stated and alleged against him in that charge, and by having been severely

(1) Printed Trial, p. 11.

(2) M.A.14, 39. See § 728.

(3) M.A.39. See § 33(5).

(4) A.W.50.

(5) J.A.G. 22nd Feb., 1873.

reprimanded in orders and afterwards released from arrest." The court was induced to express its concern in being obliged to notice the conduct of Lieutenant Colonel Newman, in having "preferred the fifth charge against the prisoner, when he, Lieutenant Colonel Newman, must have been conscious that he had before punished the prisoner, for the offence in such charge alleged against him, by a public censure and admonition inserted in the orders of the battalion."(6)

SPECIAL PLEAS.

a court martial has declined to enter on the investigation,

563. Assistant Surgeon G. Ferguson, 71st Regiment, was tried at Edinburgh Castle, in March, 1835, on four charges, and was found guilty of the first three, and the court remarked, "It having appeared in evidence that the prisoner has suffered punishment by a reprimand, under arrest at Bermuda, by competent authority, on these three charges, the court do not feel themselves warranted in awarding further punishment for the same." The sentence was approved and confirmed by the King. Had the prisoner offered, in bar of trial, proof of a reprimand under arrest by competent authority on these charges, it is possible that the court might have declined to enter on the investigation of them, as in the case of Captain Hallilay.

or to award further punishment.

564. A pardon may be pleaded in bar of trial; if full, it at once destroys the end and purpose of the charge, by remitting that punishment, to inflict which the prosecution is set on foot; if conditional, the performance of the condition must be shown; thus a soldier arraigned for desertion may plead a general pardon offered by the Sovereign, and prove that he surrendered himself within the stipulated period.

Pardon, if full, sufficient;

if conditional, condition must be performed.

565. The same principle applies to the condonation or formal overlooking of an offence by a superior, having authority to dispose of the case, with a knowledge of the circumstances. At a general court martial of which Major General Sir Colquhoun Grant, K.C.B., was president, Private — of the — Hussars, was arraigned for desertion. "The court are of opinion that the forgiveness of the prisoner by his commanding officer of this same crime of desertion now preferred against him, and the prisoner having been ordered to do his duty as a soldier in the regiment subsequently to such forgiveness, does amount to a pardon of the delinquency

Release by commanding officer amounts to a condonation of the offence, and has the same effect as a pardon,

SPECIAL PLEAS.
by the custom
of service;

charged against him; which opinion has been confirmed by the field marshal. Private — is, therefore, to be released from his confinement, and to return to his duty.”(7)

enforced by
regulation,

566. The Queen’s Regulations of 1859 laid down that “the act of placing arms in the hands of a prisoner for the purpose of attending parade or performing any duty, absolves him from trial or punishment for the offence which he has committed.”(8) This rule was modified in 1868, and the regulations now provide that if “by error” an “offender has been permitted to perform any duty, he shall not thereby be absolved from liability to punishment for his offence; but may, if the proper authority shall think fit, be summarily punished, or be brought to trial before a court martial, according to the circumstances of the case.”(9)

the case of
error excepted.

But a prisoner
liable to
punishment
by a court
martial
where fresh
circumstances
have appeared
against him,
although
advisably
released by
competent
authority.

567. It had, however, been previously held that the principle applied only in those cases where an offence has been advisably overlooked or forgiven by competent authority. These pleas do not apply where a prisoner has been released under a wrong impression as to the extent of his misconduct, or released without due authority, or without any, by a subordinate.(10) It was laid down at the judge advocate general’s office, with reference to a case where a prisoner had been released from his arrest, that if, when the lieutenant colonel applied for his release, he had a full knowledge of all the circumstances of his misconduct and did also afterwards release him from arrest, it is to be presumed that he intended to overlook the offence, and he ought not now to be put on his trial; but if the lieutenant colonel was not informed of the extent of his misconduct when he ordered his release, “such release presents no bar to his now being tried.”

Want of
specification
of charge

568. Besides the above special pleas in bar of trial it is conceived that a prisoner, before a court martial, may plead the *entire* want of specification in the charge as to matter, or time, where time is essential to it;—as, for instance, an

(7) G.O. Cambrai, 16th May, 1817.
—*Col. Gurwood*, p. 505.

(8) Q.R. (1859), page 122. The forty-sixth article of war provides that soldiers making confession of desertion shall continue to do duty until evidence of its truth or falsehood has been obtained. [§ 216]

(9) Q.R.S.6,p.32. See § 358.

(10) “When a soldier, either before the investigation of an offence, or whilst undergoing punishment, has been deprived of his arms, they are not to be restored to him without an order from the captain of his company, or other superior officer.”—Q.R.S.6,p.31.

officer charged with scandalous conduct, or a soldier with disgraceful conduct, without any mention of facts to which the charge is meant to refer.(11) But, though it be admitted to have full effect in preventing the trial of the prisoner upon the charge objected to, it cannot have the effect of barring his trial upon any valid charge wherein facts may be set forth. The prisoner's objection to the charge, if admitted, would avail upon the ground that the charge was couched in terms so vague as not to point to any specific crime, to which he might direct his attention. If then he were arraigned upon an amended charge, and by virtue of a different warrant or order, he could not consistently plead that he had been previously arraigned for the same offence; nor, if he did, would the plea be of any avail. It may be for this reason, that the objection of want of specification in charges is usually reserved for the defence, instead of being pleaded on arraignment, since the course of the prosecution would serve to identify the facts to which the charge was meant to apply, and the finding of the court would have the effect of exempting the prisoner from a second trial on charges built on those facts.(1) There can be no doubt that, where the court has unadvisedly entered on the investigation of defective charges, the total want of specification may be urged as a legitimate reason for declining all defence, and would render the proceedings nugatory or rather innocuous to the prisoner, since no sentence of punishment, in such circumstances, could be enforced. [§413] With reference, however, to these technical objections, which are only admitted by courts martial when they appear essential to abstract justice, it may be observed, that the period at which an officer would most likely urge objections to the want of specification in a charge would be on the copy being furnished him, and through the medium of the judge advocate. If his honour were at all implicated, he would scarcely postpone an objection to the charge to a time when it may operate to prevent a full enquiry; nor, if he had pleaded to a charge, would he fail to embrace the opportunity, as the only possible one which could be afforded, of placing his character in a desirable point of view.

SPECIAL PLEAS.

When the copy is furnished, is the proper period to urge objections to charge.

(11) See the case of Captain Peshall and Lieut. Colonel Austin, §457.

(1) M.A.14.

PROSECUTION.

Witness
ordered out
of court.

Prosecutor in
his discretion
opens the case,

by a statement
of the facts
he is prepared
to prove,

and this is
entered in the
proceedings
without
correction
or erasure of
any part which
has been actually
delivered.

He may then
give evidence,
as the first
witness for the
prosecution ;

569. The prisoner having been arraigned, and a plea of *guilty* or *not guilty* having been recorded, the trial proceeds: in like manner, where a plea in bar of trial has not been allowed, the trial proceeds as if no such plea had been offered. The president or judge advocate cautions the witnesses to withdraw, and to return to court only on being called, as "it is a general rule to preclude witnesses on both sides from being present at the time of the examination of other witnesses." (2)

570. The prosecutor is in every case "allowed an opening address." (3) He may however proceed to call the witnesses for the prosecution at once; but in all more important or difficult cases, it is usual for him to open the case by a statement of the facts he proposes to prove, and such view of the evidence as he may deem expedient; nor is he to be restricted in it, unless he introduces matter disrespectful to the court, foreign to the charges, or unless he insinuates imputations not implied by them: "no reproachful words are to be used to prisoners." (4) This address is invariably to be written at length, and when read by the prosecutor is in every case recorded in full on the proceedings, or signed by the president and annexed to them. Although it is the duty of the court at once to check any attempt on the part of a prosecutor to enter upon matters not put in issue by the charge, which the court have no authority to investigate, and the prisoner no opportunity of rebutting, the court is not justified in allowing the prosecutor to withdraw any part of the address which he has actually delivered, and is responsible that it is entered on the proceedings without any omission, up to the point where they interposed.

571. An officer, who is to be examined as a witness for the prosecution, is not in all circumstances absolutely prohibited from acting as prosecutor. If required to give evidence for the prosecution, he is sworn as any other witness *after* he has read any speech or observation, which he may

(2) Judge Advocate General Ryder, Trial of Lieut. Gen. Whitelock, p. 2. [§ 942] The prosecutor being a witness for the prosecution, in those exceptional cases which may occur under the existing regulations, [§ 472] is an obvious exception to this rule, and a further exception may be made, by permission of

the court, when the prosecutor desires the presence of the complainant to assist him in the examination of other witnesses. In this case the witness, so allowed to remain in court, must be the first examined. § 1300.

(3) Q.R.App.A, 11a.

(4) A.W.162.

address to the court, and *before* any other witness is called. He can give evidence as to such facts as may come within his knowledge—the evidence in this case, and this case only, (5) being given in the way of narration—and is cross-examined by the prisoner, and questioned, if necessary, by the court. The prosecutor cannot be permitted to depose generally to the facts embodied in his address, (6) but must detail in evidence all the facts as to which he may desire to give his own testimony. After the prosecutor's own evidence as to all the charges [§ 945 *n*] has been entered on the proceedings, he then proceeds to the examination of witnesses, and to the proof and reading of any documentary evidence he may have to bring forward. With the exception of his own evidence, the prosecutor is usually permitted to adduce his evidence in the order he may think fit, either as bearing on the charges collectively, or on each charge separately; but the court has occasionally interfered by classifying the charges as to time or circumstances, directing that the evidence shall, in the first place, be produced, and witnesses examined to certain counts, or as to the occurrence of events up to a certain period; (7) and subsequently upon the other divisions to the charge.

PROSECUTION.
examines
witnesses,
produces
documentary
evidence.

572. The witness, after being sworn, continues to stand whilst giving his evidence; but when the examination is unusually protracted, or the witness is in weak health, the

Witness offered
a seat.

(5) See § 480 *n*. The exception arises from the circumstance, that in this case there is no one to conduct his examination by way of question and answer. Before the judge advocate was forbidden to act as prosecutor [§ 473] he might have been available, but this expedient can no longer be resorted to. In the case of Paymaster Cunningham, 88th Regiment, the conviction, on a part of the charge, and the sentence of penal servitude by a general court martial at Rawal Pindie, in March, 1867, was set aside, although the charge was held to be proved, because of certain irregularities, one of which was the examination of the prosecutor as a witness by the judge advocate.

The occasions for this exception will be of rare occurrence, under the instructions embodied in the last edition of the Queen's Regulations: "If possi-

ble no officer who is to be called as a witness is to be appointed to act as prosecutor."—Q.R.App.B.(8)—It may be confidently expected that this regulation will have the happiest effect in preventing altercations and ebullitions of ill feeling, which the authority of the court has not always succeeded in repressing, when the prosecutor was personally interested.

(6) There have not been wanting officers, who have recommended a resort to this expedient, but it is clearly at variance with the articles of war, and equally so with the custom of the service. Witnesses are to be examined on oath; not to be examined first, and to swear to their examinations after. The witness swears that the evidence he *shall* give, not that he *has given*, shall be the truth. See A.W.153.

(7) Trial of Lieut. Gen. Whitelock, p. 11.

Witness under examination directed to withdraw.

Witnesses give their testimony

on oath,

no longer by narration, but always in answer to questions.

Evidence recorded.

Documentary evidence proved, read aloud,

and entered.

Questions reduced to writing, and submitted to president.

court desire him to be seated. He may be directed to withdraw from the court during a discussion as to the allowance of a question, or as to the sufficiency of his answer; and either party has a right to make an application to the court to this effect. (1)

573. The examination of witnesses [§ 940] is invariably in the presence of every member of the court: it has been well remarked, that "even the countenance, looks, and gestures of a witness, add to, or take away from, the weight of his testimony." The witnesses, having been sworn or having made a solemn affirmation, [§ 443] were formerly sometimes directed to state what they know relative to the charges before the court; but the regulations [§ 480] now require the examination to be conducted by question and answer, the only exception being the evidence of the prosecutor. The judge advocate takes down the evidence, as nearly as possible, in the words of the witness, and records it on the proceedings, in the order in which it is received by the court. [§ 480] Documentary evidence, having been duly proved, [§ 1010] is read aloud in open court, [§ 1037] sometimes by the witness producing it, or more regularly, at general courts martial by the judge advocate, and at minor courts martial by the president, or a member deputed by him, (2) and is then entered on the proceedings. (3)

574. A question, whether originated by the prosecutor, prisoner, or by a member of the court, is reduced to writing, (4) and then passed to the president; if approved by him, and not objected to by the judge advocate, it is entered by the judge advocate on the proceedings, or filed and numbered, when the writing of the proceedings at full is deferred till

(1) Lt. Col. Crawley's Trial, Q. 169.

(2) At the trial of Lieut. Colonel Crawley, the prosecutor having stated, in answer to the court, that the prosecution had "no objection to the course proposed," the prisoner received permission to read the documentary evidence called for by him.—*Printed Trial*, p. 82.

(3) See § 1046; also § 480 as to an application made on Lt. Col. Crawley's trial on the part of the prosecution, that certain documents might be read in closed court, in order to take the opinion of the court, might be taken as to their admissibility in evidence, when

the court "declined receiving any communication which is not to be read" [in open court] "and entered on the proceedings."—*Printed Trial*, pp. 88 and 89.

(4) At minor courts martial, and at general courts martial, in the case of questions by a prisoner who cannot, or does not write them, the questions, when there is no contention as to their admissibility, are taken down on the proceedings from the mouth of the parties, instead of being written by them or their professional advisers, and then passed to the president.

after the rising of the court. It is then read aloud, (5) and, no objection being made to it by the opposite party or a member of the court, it is addressed to the witness, who should not attempt to answer if an objection is made. Should the president or the judge advocate object to the question, it is returned for consideration to the person proposing it, who may withdraw it. If persisted in by such person, the question is invariably entered upon the proceedings; and thereupon, (as also if a question, on being read out, be objected to by a party before the court, by a member, or by the witness under examination,) the court hears any observations which may be offered by the parties concerned, first by the party raising the objection, then by the opposite party against the objection, and lastly a reply in support of it. (6) The court is then cleared and proceeds to determine by a majority of votes, the president having a casting vote, [§ 619] whether it shall be put or be rejected, or whether it shall be referred for the opinion of superior legal authority. [§ 459]

Objection to particular question.

575. Objections to a question put by the court obviously do not stand upon the same footing as those to questions proposed by the parties before it, but the court is equally bound by the laws of evidence, and, upon good reason shown, may withdraw or modify the question. A question put by an individual member must in some sense be considered as a question from the court; yet, where the collective opinion of the court has not been expressed, as to the propriety of any given question, a party before it is entitled to such aggregate opinion. If the objection is not sustained, the question is entered as put "by the court." When the question is rejected, it is entered on the proceedings as having been proposed "by a member" *without the mention of his name*.

Objections to questions by court;

by member.

How entered on proceedings.

576. It has been remarked, [§ 574] that every question to a witness, proposed by either prisoner or prosecutor, unless palpably illegal and improper and at once withdrawn by

Question entered, not to be expunged,

(5) After the first few days of the trial of Lt. Colonel Crawley, a "plan was adopted of allowing each side to read its own questions, as soon as they had received the sanction of the president."—*Times*, Nov. 23, 1866.

(6) Assist. Surg. Morris's Trial, Q. 957. This course was prescribed by

Circular, Nov. 9th, 1866, now embodied in the regulations. See § 582 c.

Both prosecutor and prisoner may request that their object in proposing, or reasons for objecting to a question, which they are at liberty to lay before the court in writing, may be entered on the proceedings.

Objections
to questions,

but recorded
with the decision
of the court.

Caution as to
rejecting
questions pro-
posed by
prisoner.

Cross-exam-
ination by
prisoner :

re-examination :

questions by
court, and by
parties through
court.

Correction or

them, is in the first instance entered before being read aloud; when once entered it cannot be expunged. In those cases where the court exercises its authority in refusing to allow a question to be put to the witness, the question so rejected still appears on the proceedings, accompanied by a statement of the objection to it, in order that it might be known to the confirming authority whether the court has exercised its authority according to law. In coming to a decision the court will do well to bear in mind the caution suggested by the following opinion of the judge advocate general (Mr. Mowbray), which embodies the principle invariably acted upon in that department: "It is a matter of great importance that a prisoner on trial by court martial should be restricted as little as possible in the examination of his own witnesses, or in the cross-examination of those called by the prosecution, as an error in this respect by the court may invalidate the whole proceedings." (7)

577. The examination in chief of each particular witness being ended, the cross-examination usually follows, though it is optional with the prisoner to defer his examination until the close of the prosecution and he is placed on his defence. The re-examination by the prosecutor, on such points as the prisoner may have touched on, succeeds the cross-examination; and either party may then suggest to the court questions as to the new matter elicited by them. A court martial has unquestionably the right of putting questions to witnesses at any period of their examination, but this power should be employed with great discretion and much reserve. The exertion of it has sometimes proved embarrassing to the court itself. It is very seldom that a case can arise which would justify this interference with the prosecution or defence. The court and each individual member ought to reserve all questions until after the examination of a witness is finally concluded by the parties to the trial. It will frequently be found that the development of evidence in the ordinary course of examination will have anticipated the necessity of questions occurring to members during its progress. [§ 948]

578. It is the usual practice to read over to each witness, immediately before he leaves the court, the record of his

(7) J.A.G. to Lt. Gen. Sir H. Storks, 6th March, 1867, and see § 970, 1309 n.

examination, which he is desired to correct if any mistake has been made in entering his evidence, and, with this view, any remark or explanation is entered on the proceedings, (1) as are also any corrections which may be pointed out by the parties to the trial. It would obviously be improper to read over the record to a witness, or to permit him to refer to it when under or previous to cross-examination; but the opposite party or the court may call upon him to reconcile contradictory statements; and he may also correct or explain any mistake he may have made in his evidence in chief or in his cross-examination. No erasure or obliteration is, in any circumstances, admitted, as it is essentially necessary that the authority which has to review the sentence should have the most ample means of judging, not only of any discrepancy in the statements of a witness, but of any incident which may be made the subject of remark by either party in addressing the court. A minute might be made of the sense of the court on the matter inadvertently admitted, that members may dismiss from their consideration any impression which might have arisen, and that the confirming authority may be aware of the inconsequence of the admission.

explanation of
testimony,

by addition,

not by erasure.

579. It has been stated that a list of witnesses for the prosecution is furnished to the prisoner before the assembly of the court, [§ 420-2] and also to the court on assembling; the prosecutor is not however bound to examine all of them, but it is usual to call all the persons upon such list, or such of them as the prisoner intimates a wish to have called, in order that he may cross-examine them, if he thinks proper to do so. (2) When the prosecutor does not offer them for cross-examination, (3) the prisoner has a right to call them. Should the prisoner, having closed his cross-examination, think proper subsequently to recall a witness for the prosecution for his defence, the witness is then subject to cross-examination by the prosecutor.

Prosecutor's
witness having
been cross-
examined, if
subsequently
recalled on
defence,
examination
is held to be
in chief.

580. Although either party may have concluded his case, or the regular examination of a witness, yet, should a material question have been omitted, it is usually submitted by the party (4) to the president for the consideration of the

Material ques-
tion omitted
put by court.

(1) See § 478, and "Correction by witness," § 960.

(2) Lt. Col. Crawley's trial, Q. 1131, 1019, &c.

(3) This was done. Assist. Surgeon Morris's Trial, *Blue Book*, p. 193.

(4) Lieutenant General Whitelock's trial, 439-441.

court, who may allow it, subject to the observation [§ 582 *e*] and, if put, to the cross-question of the opposite party. It has however been ruled, that the court after the prosecution is closed, should not, except in special circumstances, recall a witness for the prosecution, to prove a fact material to the charge.

Instructions issued in 1866 as to addresses to the court from the prosecutor and prisoner,

founded on the act of the previous year for regulating the speeches of counsel at ordinary criminal courts.

Text of the Queen's Regulations as to

581. The trial here reaches the stage where the new regulations begin to affect it. The practice of courts martial as to addresses on the part of the prosecution and defence had been regulated by custom, until a general order was issued, dated 9th November, 1866, "with a view to regulate and render uniform the procedure of general courts martial." By these Regulations [§ 582] in imitation of the practice of ordinary criminal trials, as regulated in 1865 by Mr. Denman's act (28 Vict. c. 18), the prisoner was deprived, before a general court martial, of his customary right to the last word—"the practice of the prisoner having a rejoinder to the reply of the prosecutor being regarded as an irregularity," (1) and the judge advocate was required, "in open court to sum up the case to the court."

582. These regulations have been modified, as follows :—

a. "The officer conducting the prosecution is to be allowed an opening address. At the close of the evidence for the

(1) G.O. 9th Nov. 1866. Rejoinders may have no doubt appeared irregular to lawyers from the point of view of the common law courts, where a professional prosecutor is restrained by well understood, although, perhaps, unwritten rules, and there is an experienced judge and a trained bar always ready to detect any irregularity in his reply. But they had grown up in the practice of courts martial, which, it must be remembered, are held in very different circumstances, especially as the services of experienced officers as judge advocates and members are not always available in small garrisons or in isolated stations.

There can be no doubt that, apart from the actual exercise of the abrogated right of observing on the prosecutor's reply, the feeling that a rejoinder might follow may in some cases have held in check any disposition to

take unfair advantage, and there are the printed trials to prove that courts martial have constantly admitted the prisoner's claim from the trial of Lord George Sackville in 1760, down to the trial of Ensign Cullen, who was allowed a rejoinder after the order had been issued at the Horse Guards, and before it was promulgated in Jamaica.*

And this has been done, not in ignorance of the fact that a rejoinder was a deviation from the rule in ordinary criminal courts, but because it had been recognized as a peculiarity of English military jurisprudence, founded, as is well pointed out in the following extract from a work published as long ago as 1783, upon the "custom of war in like cases" :—

"This circumstance of a rejoinder being allowed the prisoner in a criminal trial before a court martial, and not in the courts of common law, tends greatly

* "Monday, the 3rd December, 1866. The prisoner claims his right to a rejoinder. . . . The application having been acceded to, the court adjourns for half an hour to enable the prisoner to prepare his remarks in rejoinder."—*Trial of Ensign Cullen*, Blue Book, p. 96.

prosecution, the deputy judge advocate will ask the prisoner if he intends to adduce evidence. If the prisoner then replies in the negative, the prosecutor may proceed to address the court a second time, for the purpose of summing up the evidence for the prosecution, after which the prisoner may address the court in his defence. At the conclusion of the prisoner's address, the deputy judge advocate will, in open court, sum up the whole case to the court.

the addresses of
prosecutor and
reply of prisoner

1. Where prisoner does not adduce evidence.

b. "If, in answer to the deputy judge advocate, the prisoner states that he intends to adduce evidence, he may open his case with an address, before calling his witnesses. At the conclusion of the evidence he may again address the court, after which the prosecutor will be entitled to a reply.

2. Where prisoner adduces evidence.

c. "In those special cases where evidence is allowed in reply, the second address of the prisoner is to be made after such evidence, and immediately before the prosecutor's reply, which is to be followed by the address of the deputy judge advocate."

3. Where defence lets in evidence in reply.

d. After the deputy judge advocate has spoken, no other address is to be allowed, and the court will retire to consider their finding.

e. If any question should arise incidentally during the trial, such as upon the admissibility of evidence, the person, whether prosecutor or prisoner, requesting the opinion of the court, is to speak first; the other person is then to answer, and the first person is to be allowed to reply. (2)

Parties heard as to incidental questions.

583. The prisoner having been placed on his defence, after the prosecutor's second address, as above; [§ 582 a] or upon his answer to the judge advocate "that he intends to adduce evidence," may request, and in that case is usually granted, a certain time, perhaps a day or two, or more, to

DEFENCE.

Time allowed for preparing,

to confirm the doubt expressed above in regard to the truth of Major Adye's position, that 'where the act of parliament and articles of war are silent, courts martial must in their proceedings conform to the practice of the established courts of judicature.' Now, this method of proceeding is neither directed by that act, nor by the articles of war; nor is it conformable to the practice of the civil courts; notwithstanding Major Adye himself allows it to be regular and legal. Whence, then, does the practice deduce its origin, and by what authority is it

established? This question, I apprehend, we shall find it extremely difficult to answer, without the supposition of some other law, independent as well of the mutiny act and articles of war as of the civil law of the realm. Now, what can this be but the custom of war, *lex non scripta* of the army, to which the common law is correspondent, as the statute law is to the written rules and articles of war."—*The Elements of Military Arrangement*, by Captain John Williamson, 65th Regiment, vol. II. note 113, p. 67.

(2) Q.R. App. A.p. 11 a-e.

DEFENCE.

as also access
to proceedings,
during the
adjournment
of the court.

Prisoner may
address the
court before
or after the
examination
of witnesses,

or both before
and after.

Course of
examination
of witnesses
for defence
corresponds
with that for
prosecution,
except as to
postponement of
cross-exami-
nation.

The prisoner's
final address
after the
evidence on both
sides has been
received.

arrange and prepare his defence. He may also apply to the court for permission to refer to the proceedings, subject to the necessary conditions for their security [§ 483].

584. When the prisoner enters upon his defence, he may, as above laid down, [§ 582*b*] "open his case with an address," or he may proceed at once to the examination of witnesses; "first to meet the charge, and secondly, to speak as to his character," (4) and reserve his address until the conclusion of the examination of his own witnesses, or of the witnesses which in special cases [§ 582*c*] the prosecutor may be allowed to call in reply. [§ 600] In the first case he may deliver a statement, commenting on any discrepancies in the evidence produced on the prosecution, placing his conduct, which is the cause of arraignment, in that point of view which he may deem most conducive to his exculpation, and pointing out the chain of evidence by which he proposes to establish his defence. The other is the course usually adopted, for it is obviously more advantageous to the prisoner to be enabled to argue on facts and evidence actually established, than to rest his defence on what may prove to be only hypothetical. It did not accord with the procedure of the common law courts until it was amended by the recent act, but nothing was better established by the custom of courts martial, than to leave the time of the delivery of the prisoner's address to his option, either before or after the examination of his witnesses, or to allow him to open his defence by a detail of the evidence he intends to bring forward, and defer his remarks upon the prosecutor's address till after the examination of his witnesses. The prisoner having finished the examination in chief of each witness, the prosecutor immediately proceeds with his cross-examination, except for some special reason to be allowed by the court, for unlike the prisoner, he has no customary claim to postpone it. The prisoner re-examines to the extent allowed to the prosecutor, that is, on such points as the cross-examination may have touched on; and the court puts any questions deemed necessary.

585. After the examination of witnesses for the defence and in reply is finally closed, the prisoner has a right to address the court. He may offer any statement or argument he deems calculated to weaken the force of the prosecution,

(4) Circular, Horse Guards, 24th February, 1830.

by placing his conduct in the most favourable light, accounting for or palliating facts; confuting or removing any imputation as to motives; answering the arguments of the prosecutor; commenting on any contradictory evidence; connecting his exculpatory evidence, and contrasting it with the evidence of the prosecution where the result promises to favour the defence, and finally drawing the conclusion to which he desires to lead the court (5). Mr. Serjeant Hawkins, in reference to the custom which formerly prevailed in criminal courts, of debarring a prisoner from counsel, unless some points of law arose proper to be debated, makes some remarks which are very applicable to prisoners before courts martial; and the duties of the court, as there laid down, are equally incumbent on courts martial. He says: "This, indeed, (the refusing counsel in treason and felonies,) many have complained of as very unreasonable; yet, if it be considered, that, generally, every one of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest defence, which, in cases of this kind, is always the best; the simplicity and innocence, artless and ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own. And if it be further considered, that it is the duty of the court to be indifferent between the King and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that, generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than prejudice in having the court their only counsel. Whereas, on the other side, the very speech, gesture, and countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them." (6)

586. It occasionally happens that on presenting to the court a written address, the prisoner is unequal to the task

Advantages
arising from
prisoners
defending
themselves,

and duties of
the court in
respect to them

Reading of
address by
friend of
prisoner.

(5) When the prisoner's defence is not written, the regulations—App. B. down as nearly as possible in his own words, and in the first person."
(4)—require that "it should be taken (6) 2 Hawkins, 564.

Address read for
the prisoner,

of reading it, from indisposition or nervous excitement. On such occasions the president, or other member of the court, or the judge advocate, is sometimes requested to read it; but, as the impression which might be anticipated to arise from it may, in the judgment of the prisoner, be affected more or less by the manner of its delivery, courts martial permit it to be read by any friend named by him not being his professional adviser, and particularly if that friend be a military man. On the trial of Lieutenant General Whitelock his counsel was not permitted to read the defence, as being contrary to precedent: but the general was informed that any military friend, or any near connection who did *not attend to assist him professionally*, might read it for him. (1) More recently on the trial of Lieutenant Hyder, 10th Hussars, at Leeds, in 1845, it was decided that, in conformity with the law and practice of courts martial, the court would allow of any military friend or any civilian, provided he were not his professional adviser, to read his defence. (2) Indeed, this point would seem to have been better established in the practice of courts martial than the custom of resisting the attempt of a professional adviser to *address* them; and it is now laid down in the regulations, that he is not to be permitted to do so. (3)

but not by
professional
adviser.

Greatest
license
permitted in
the defence,
compatible
with dignity
of court.

587. The utmost liberty consistent with the interest of parties not before the court, and with the respect due to the court itself, should, at all times, be allowed a prisoner. As he has an undoubted right to impeach, by evidence, the character of the witnesses brought against him, so is he justified in contrasting and remarking on their testimony, and on the motives by which they or the prosecutor may appear to have been influenced. All coarse and insulting language

(1) Printed Trial, p. 763.

(2) Printed Trial, p. 106. The prisoner on this occasion strongly urged the court to grant this permission in favour of Mr. Warren, Q.C., whom he had retained. The president however adhered to the decision he had expressed, but added, that it occasioned much disappointment to the members of the court not to hear his counsel read his defence. Lieutenant Hyder then referred to a case where a court martial had permitted the prisoner to have the assistance of counsel in read-

ing his defence, but, the court having been cleared for deliberation, the decision was reiterated.—Printed Trial, 107.

(3) Q.R. App. B (3). See § 474. At the "Fenian" trials, the president read the written defence of Gunner Flood, R.A., 12th February, 1866, and of Lance Corporal Mulvahill, 3rd Buffs, 15th Feb. 1866. Major Gordon, a member, read the defence of Col. Sergeant McCarthy, 12th day, 13th June, 1866.

is, however, to be avoided ; nor ought invective ever to be indulged in : the most pointed defence may be couched in the most refined language. The court will prevent a prisoner from advertent to parties not before the court, or only alluded to in evidence, further than may be actually necessary to his own exculpation. Mr. Tytler (4) has justly remarked on this subject : "It may sometimes happen that the party accused may find it absolutely necessary, in defence of himself, to throw blame, and even criminality, on others who are no parties to the trial ; nor can a prisoner be refused that liberty which is essential to his own justification. It is sufficient for the party aggrieved that the law can furnish ample redress against all calumnious or unjust accusations."

Third parties to be alluded to most cautiously.

such course may sometimes be expedient.

588. The court is bound to hear whatever defence, that is, whatever address, the accused may think fit to adopt, not being in itself contemptuous or disrespectful. In the application of this principle, a court martial can hardly go wrong in allowing the greatest freedom of speech to a prisoner on his trial. It has however been laid down on authority : "It is competent to a court to caution the prisoner as he proceeds, if they should think proper, and to state to him that, in their opinion, such a line of defence as he may be pursuing would probably not weigh with them, or operate in his favour ; but to decide against hearing him state arguments which, notwithstanding such caution, he might persist in putting forward as grounds of justification or extenuation, such arguments not being illegal in themselves, is going beyond what any court would be warranted in doing." (1)

Liberty of speech allowed to prisoner in his defence.

Court not warranted in refusing to hear an irrelevant defence.

589. A prisoner in his defence may either negative the allegations contained in the charges against him ;—or may admit all or some of them, and nevertheless be able to give such an account of his conduct as, when borne out by facts and circumstances proved in evidence [§814-5], may prove them to have been not inconsistent with his duty,—or failing this, may bring forward any matters of excuse and justification. The defence has sometimes rested exclusively upon proof of the previous punishment for the offence submitted to investigation. This and other analogous defences have

Pleas in bar of judgment.

The defence may embody the matter of pleas in bar of trial

(4) Essay, 302.

judge advocate, Lieut. Dawson's Trial.

(1) Letter, judge advocate general (Sir J. Beckett) to the officiating

—Printed Trial, p. 83.

or certain
other grounds
of exemp-
tion from
punishment;

been already mentioned when discussing the pleas in bar of trial which may be pleaded on arraignment. [§ 558-568] There are also certain grounds of exemption from the censure of the law, as to which Sir William Blackstone observes: (2) "All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will." To the excuses (1-v), which may have to be considered by a court martial, it is now requisite briefly to advert.

insanity;

590. (I.) Absolute insanity (like total idiocy) excuses from the guilt, and, of course, from the punishment of a crime committed during this incapacity. (3) The defect of the intellectual faculties must be unequivocal and plain, not an idle frantic humour or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind: (4) but if the accused has lucid intervals, and reason sufficient to enable him to discern right from wrong, he is answerable for what he does in those intervals.

madness;

lunacy;

insane
delusions;

So far the law is clear and explicit, but there has been a difficulty in the cases of alleged crimes committed by persons afflicted with insane delusion in respect to one or more *particular* subjects or persons, but *not* insane in other respects. The acquittal in March, 1843, of McNaughten, for the murder of Mr. Drummond, having given rise to a discussion in the house of lords, certain questions were propounded to the judges, and they answered, that in the case of such persons charged with the commission of a crime (murder for example), and insanity being set up as a defence, "if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable." They further stated, that, with respect to a person under an insane delusion as to existing facts—the delusion being partial, and the person not being insane in other respects—committing an offence in consequence thereof, they were of opinion that "he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real. For example," they go on to say, "if, under the influence

partial
delusions,

when an
excuse.

(2) 4 Commentaries, 20, 21.
(3) 4 Blackstone, 24.

(4) 1 Hawkins, 2.

of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.”(5) It may be added, that whenever insanity at the *time of the commission of the offence* is given in evidence, and the court martial acquits the prisoner, they should specify in their finding whether they were of opinion he was insane at that time, and whether they acquit him on account of such insanity; (6) and in this case their finding should be “not guilty on the ground of insanity.”

An acquittal on account of insanity must be so specified.

591. (II.) Drunkenness is looked on by the law of England as an aggravation of the offence, rather than as an excuse for any criminal behaviour; still, unless a predetermination to commit the offence be apparent or can be inferred from circumstances, it requires an effort of our reasoning faculties to concur in the justness of this principle. The law of England, however, considering how easy it is to counterfeit this excuse, and how weak an excuse it is when real, will not suffer any man thus to privilege one crime by another: (7) “He who is guilty of any offence whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober.” (8) The spirit of this maxim pervades the decisions of courts martial, and a deviation from it was highly censured by the then commander in chief in India, Lord Combermere. (9)

Drunkenness no palliation of offence.

592. (III.) As to misfortune or chance, it is held, that if an accidental mischief happen from the performance of a lawful act, the party stands excused from all guilt; but if a

Misfortune or chance, when an excuse.

(5) Journals, H.L. LXXV. 401; (19th June, 1848). See § 957.

(6) “If a man, in a sound mind, commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried, for, how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pro-

nounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.”—4 Blackstone, 24.

(7) 4 Blackstone, 26.

(8) 1 Hawkins, 3.

(9) Trial of Lieutenant G. G. B. Lowther, 44th Regiment, 28th October, 1828.

man be in the performance of an unlawful act, such act being in its original nature wrong and mischievous, (not merely technically illegal, but morally vicious,) and a consequence ensue which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse. (10)

Ignorance or mistake, when an excuse.

593. (IV.) Ignorance or mistake is a defect of will: when a man, intending to do a lawful act, does that which is unlawful: as if a soldier, intending to fire on the enemy, kills some of his own people; or firing by order of his officer at a target, kills a bystander; or a man, intending to kill a thief or housebreaker in his own house, kills one of his own family; these and such like actions are not criminal. A mistake as to a point of law in criminal courts is no sort of defence; (1) neither is ignorance of the military law, of the rules and regulations of the army, or other public order, of which it may be the duty of military men to be informed, admitted as an excuse for their non-observance. (2)

Mistake of law, no excuse.

Compulsion or inevitable necessity.

594. (V.) Compulsion, or inevitable necessity, is the remaining plea which it is necessary to notice; and this it is of the more importance to advert to, as it may frequently come in question on trials by courts martial. Military law, and the common law of England, have, in this case, a shade of variance. Blackstone says: "Of this nature (*i. e. compulsion and inevitable necessity*) is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal.—The sheriff who burnt Latimer and Ridley, in the

Compulsion: civil subjection:

Compulsion.

(10) 4 Blackstone, 26.

(1) 4 Blackstone, 27.

(2) The Queen's Regulations have very distinctly confirmed this statement: "Ignorance of published orders will never be admitted as an excuse for

their non-observance."—Q.R. S. 7, p. 14. This paragraph is very precise as to the promulgation of "current changes," and in its directions for orders reaching those to whom they specially relate.—See § 96.

bigoted days of Queen Mary, was not liable to punishment from Elizabeth for executing so horrid an office." (3) Military courts would be disposed to extend the exculpation, admitted by common law to arise from compulsion when the act is performed by the obligation of civil subjection and "in obedience to laws in being," to acts performed in obedience to the order of a military superior. For though, if death ensue from the fire of a soldier acting under the orders of his superior, the command itself being illegal, such order would be no justification of the soldier in the eye of the common (4) law; and the soldier who was the instrument of death would, with him directing the act by which it was effected, be equally held guilty of murder; yet a military court would accept such necessity as a justification, the breach of law itself not being a palpable and evident dereliction of duty and discipline, or a clear and manifest outrage on all law and decorum. (5)

Compulsion.

Military obedience to orders not manifestly illegal.

595. This argument raises a most difficult and delicate question; it provokes discussion as to the phrase *lawful command*, in the mutiny act, (6) and articles of war. [§ 178]

Lawful command.

(3) 4 Blackstone, 28.

(4) The Scotch law in accordance with the civil (i.e. Roman) law does allow the compulsion of military obedience; and "limits the prosecution to the officer alone as the author of the wrong." (Hume's *Commentaries on the Laws of Scotland* (1829), chap. i. p. 53). See the case of Ensign Hugh Maxwell, of the Lanarkshire Militia, who was tried before the High Court of Justiciary at Edinburgh in June, 1807, for the murder of a French prisoner of war at Greenlaw on the 7th January, 1807, by ordering Private John Gow to fire, when he was on sentry at the prison at Greenlaw. The private was not put upon his trial, and the officer was sentenced to nine months' imprisonment.—Buchanan's *Remarkable Trials*, p. 3.

(5) On a trial, arising out of the Newtownbarry affair, at Wexford, in July, 1831, before Chief Justice Bushe and Judge Johnstone, the following conversation is reported to have taken place.

"Sir William Cox (a grand juror). My Lord, I would wish to ask your lordship one question. If a military body be called out, and if the com-

mander give the order to fire, whether those acting under his command are exempt from the consequences?

"His Lordship. My opinion is, that no subject of the king is bound to obey an illegal order, and if an officer give an illegal order, those who obey him are not, in my opinion, exempt.

"Juror. Then, my lord, is the soldier to be the judge for himself in the case, whether he is to obey the order or not?

"His Lordship. I suppose so.

"Juror. Then this being so, the circumstance will be received below in mitigation.

"His Lordship. I have nothing to do with that.

"The jury on this retired."

This remark of the learned judge caused much discussion amongst military men; but there appears nothing new in the opinion; there can be no doubt of its being the law of England. No alteration has been made in this respect in the text of this work.—*Author*, 1835.

(6) "If any person subject to this act . . . shall disobey any lawful command of his superior officer . . .

Compulsion,

whether
command
lawful
as commanding
acts lawful
in themselves ;

or as being
the command,
of a lawful
superior.

Whether the
competence of
the superior
depends on
his orders
being according
to law ;

or on his legal
power to give
military
commands.

It has been authoritatively declared: "That orders are lawful when issued by authorities legally constituted and competent to give them, responsible to their sovereign and country for their acts, and for the exercise of the authority with which they are invested." (7) This passage admits of two readings. According to the one, the legality of the order would be judged from its own nature, or rather from the nature of the acts thereby commanded, the responsibility, which might attach to the doing of an unlawful act, resting with the inferior acting in obedience to the orders of his commanding officer ; the law of the land being held compulsory on the soldier, obliging him to judge of the legality of any order, to which his obedience may be commanded ; its jealousy, in fact, refusing him, on embracing the profession of arms, the power of divesting himself of his privileges or responsibilities as a citizen in such degree as to render him irresponsible for his acts by pleading the order of a superior. According to the other reading the bare issuing an order by duly constituted authority, without reference to its nature, would render it lawful ; the soldier obeying being considered as the instrument only, as a mere automaton, irresponsible for acts done in execution of orders issued by authorities *legally constituted*. If the first be the true interpretation ; if it mean that orders are lawful when issued by authorities legally constituted and *competent* (exercising power within the law) to give *them*,—the *particular* orders which may be the subject of consideration ;—there is no truth more evident, and no order more in unison with the ordinary acceptation of the phrase in the mutiny act. If, on the other hand, it mean that orders are lawful when issued by authorities legally constituted and competent (by their superiority of rank) to give them, orders in general, without reference to the nature of the particular order in respect to the lawfulness or otherwise of the acts thereby ordered to be done—it is a version of the law hitherto unsuspected by the bulk of the army, and it would render any further discussion unnecessary, as no case

shall suffer DEATH, or such other
"punishment as by a court martial
"shall be awarded."—M.A.15.

(7) Letter of the commander in
chief to the commander of the forces
at Malta, directed to be communicated

to the garrison, on the promulgation
in orders of the sentence of the courts
martial on Lieutenant Dawson and
Captain Atchison. *Horse Guards*, 5th
Oct. 1824.

could possibly arise where the order of a superior could be pleaded, and it would not at once be a complete justification of any act resulting from the execution of such order. But, as orders are only professedly, but not invariably, in furtherance of the enactments of the legislature and in consonance with the law of the land, and as the words of the mutiny act are "disobey *any lawful command* of his superior officer," not "*any command* of his *lawful superior*," it follows that the first of the two constructions, here discussed, must be the true one; and, therefore, it is lawful, in the military sense, to disobey an unlawful command of a superior. (8) And the true and practical intent and meaning of this appears to be, that—so long as the orders of a superior are not obviously and decidedly in opposition to the well-known and established customs of the army, or to the laws of the land; or, if in opposition to such laws, do not tend to an irreparable result;—so long must the orders of a superior meet prompt, immediate, and unhesitating obedience. It surely cannot accord with justice to render a soldier responsible, even in courts of civil judicature, for an illegal act resulting from the execution of an order, not in itself so glaringly opposed to all law, as for its illegality to be apparent without reflection or consideration: hesitation in a soldier is, in certain circumstances, a crime; (9) and hesitation is inseparable from reflection and consideration: reflection and consideration, therefore, when tending to question the order of a superior, must, in some sense, be considered as a military offence.

Compulsion.

596. The difficulty of defining compulsion, depending on the necessity of military obedience, would be equally great

Difficulty of defining justifiable compulsion.

(8) His late royal highness, the commander in chief (*the Duke of York*), on an occasion which the author does not feel at liberty fully to detail, indited the following remark: "although in these cases" (in the case before his royal highness an officer had respectfully declined to comply with the order of his superior, as to making some returns), "the general answer must be, that in every military service by land and sea, the junior officer must obey all lawful commands of his senior officer, such officer being personally responsible for the orders he gives; yet discretion and the custom of the service place

certain bounds to this rule; and the particular case alluded to falls entirely within these bounds."—*From the manuscript original*. [Author, 1830.]

See also [§ 236] an opinion of the judge advocate general, concurred in by H.R.H. the field marshal commanding in chief, and the secretary of state for war, in the case of Captain Jervis, when a charge of disobedience was not held to "disclose any legal offence" as the order "was not a lawful order."

(9) Lieutenant Dawson was charged with *hesitating* and declining to carry into execution orders he had received, &c. G.O. No. 482.

Compulsion.

with that of ascertaining the particular cases in which disobedience of orders may be justified, on the plea of being in their nature opposed to the law of the land; the cases would mutually illustrate each other. It requires no deep consideration to comprehend and to assent to the abstract statement, that every legal order may be legally obeyed; and its converse, that every illegal order may be legally disobeyed: but there is often great difficulty in acting on these self-evident propositions. (1) The legislature has decreed the highest possible punishment, the *ultimum supplicium*, as the penalty of disobedience; compulsion arising from military subjection may therefore, it is presumed, reasonably be pleaded in most cases; the will may often be either neuter or opposed to the deed. On the other hand, to carry the principle of blind obedience to the full extent to which, by easy deduction, it may be extended; to leave out of sight or render nugatory the "lawful," of the mutiny act (2) would not only degrade the British soldier in his own eyes, and in the estimation of his countrymen, but might lay the foundation of a superstructure, dangerous, if not fatal, to the constitution itself.

Compulsion
from fear of
death.

597. Another species of compulsion, sometimes pleaded in cases of mutiny and rebellion, arises from threats or menaces, which induce a fear of death; but the only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels or mutineers. It is incumbent on them, who make force their defence, to show an actual force, and that "they joined *pro timore mortis et recesserunt quam cito potuerunt*." (3) The following case is applicable to the question: "In 1813, a serjeant (a German) of H.M.

(1) The suspension of Lieutenant Colonel Capper and Major Boles, the adjutant general and deputy adjutant general, by Sir George Barlow and the government at Madras; the one for concurring in, and the other for signing, an order of the commander in chief (General Macdowall), in the usual course of duty, together with the reasoning of Lord Minto, in his despatch on the subject of the Madras government, might be quoted as a case in point, and may be referred to with advantage on a consideration of

the question. See § 522 n.

(2) It would virtually be a return to the wording of the mutiny act of George I.—"the military command of his superior officer"—which led to the protest already quoted, [§ 178] whereas the limitation introduced by the insertion of the word "lawful" may rather be taken to correspond with that in the Laws of War in the time of King Henry V., "*in licitis et honestis*," in things lawful and honest.—*Upton*, 136.

(3) *Alex. McGrowther's case*, *Foster*, 14.

60th regiment of foot, who had originally deserted from the French, entered that regiment by a voluntary enlistment; on the advance of the army, under the Duke of Wellington, into Spain, he was taken prisoner by the French. To save his life, forfeited by the act of desertion, he entered into the *corps des étrangers*, set apart in the French service for such men, as an inducement to them to return to it. At the battle of Vittoria, he was again taken prisoner by the English, and a general court martial was ordered to try him for desertion. The first sentence acquitted him of the *act of desertion*, there being the powerful inducement to the act, with the view of saving his life; but the sentence was revised, and it is stated that, on revision, he was sentenced to suffer *death*, and was afterwards shot in the presence of that division of the army to which he belonged. I also understand that it was intimated to the above court, that the excuse pleaded by the prisoner was inadmissible, as he should have preferred death rather than to have entered the service of the enemy." (4) Since, by the revised opinion, it appears that the evidence justified conviction, it is difficult to imagine, whatever might have been the ulterior award, how the court could have acquitted the prisoner of the *act* of desertion. They might have omitted to award punishment, if they considered the circumstances to amount to compulsion, *pro timore mortis*.

598. The prisoner's witnesses having been examined he may thereupon address the court—again, if he opened the case with an address—except in those special cases, [§ 582c] where evidence is allowed in reply, when the prisoner's address is to be made immediately after such evidence, and before the prosecutor's reply.

Closing
address for
the defence,

after the
prosecutor has
adduced all his
evidence.

599. According to the former practice of courts martial the prosecutor was not only entitled to a *reply* when the prisoner had adduced evidence, either oral or documentary in his defence, as under the present regulations; [§ 582b] but he was moreover permitted to reply, although not to call witnesses to rebut the prisoner's statements, when the prisoner had in his address opened *new facts* upon his own assertion, or upon documents which he may have read without proving them in evidence. In Mr. Denman's act there

A REPLY
is always al-
lowed when
the prisoner
has adduced
evidence in
his defence.

(4) Hough, *Practice of Courts Martial* (1825), 264.

EVIDENCE IN
REPLY.

The regulation
has tended to
simplify the
proceedings,

from the
precision and
definiteness
of its provisions.

Prosecutor
allowed time
for preparing.

EVIDENCE IN
REPLY.

How far the
prosecutor
may examine
witnesses to
rebut the
testimony of
defence ;

but he cannot
repair his
omissions or
strengthen his
original case.

Rationale of
evidence
in reply.

is a saving of the right of reply as before the passing of the act, but it will be observed that the new regulation [§ 582a] makes no provision for reply in any case where the prisoner does not adduce evidence, but requires the judge advocate to proceed with his summing up at the conclusion of the prisoner's address. This has very much simplified the proceedings, as the court has in no case to consider whether the prosecutor is entitled to reply, the exercise of his right to make either one or two addresses being entirely within his own discretion, (5) and the time for doing so being definitely fixed by the regulations, according as the prisoner does, or does not, adduce evidence. It is, however, for the court, on the application of the prosecutor, to allow him such time as they may think reasonable for the purpose of writing his address.

600. Although the court is relieved from the necessity of deciding as to the admission of the prosecutor's *address* in reply, it still remains to consider the special cases where *evidence* is allowed in reply. Should the prisoner have examined witnesses as to an *alibi*, or points not touched on in the prosecution, or should he have entered on an examination reflecting on the credibility of the prosecutor's witnesses, he is allowed to produce rebutting evidence, and in cases of surprise, he may apply for time for this purpose. The court is very guarded to prevent the examination of witnesses in reply on any point not introduced by the prisoner. The prosecutor must be confined to re-establishing the character of his witnesses,—that is, their general credibility, not the truth of their testimony as to a specific fact, nor the value of any particular statement or answer;—to impeaching the witnesses for the defence, and to rebutting the *new matter* brought forward by the prisoner and supported by evidence: he cannot be allowed to examine on any points which, in their nature, he might have foreseen previous to the defence of the prisoner.

601. An observation by Lord Ellenborough is much to the purpose: "If any *one fact be adduced by the defendant,*

(5) In the form (Q.R. App. B. (5), "the prosecutor declines making a reply" is given as an alternative. In criminal courts, the rule, as settled by the judges in 1837, is that "if the only evidence called, on the part of the pri-

soner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do."

to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact; he cannot go into general evidence in reply to the defendant's case: there is no instance in which the plaintiff is entitled to go into half his case and reserve the remainder." Matters merely stated in the defence and not proved, or which the court has stopped, the prosecutor has the same opportunity of contradicting in his reply. (6)

EVIDENCE IN REPLY.

602. The prosecutor will not be permitted to bring forward evidence to rebut or counteract the effect of matter elicited by his own cross-examination; his claim to adduce evidence in reply is strictly confined, as before observed, to new matter *introduced* by the prisoner, and supported by the prisoner's examination in chief. Mr. Tytler proposes the following case as an example: "A prisoner is charged with an act of mutiny, and the charge clearly proved; but the prisoner, in his defence, alleges and adduces evidence to show that he was compelled by others to the commission of the act, against his own will and at the hazard of his life. This being new matter, to which the former evidence for the prosecution does not in the least apply," (and which, it may be added, there is no absolute reason for assuming that the prosecutor could anticipate,) "the prosecutor is allowed to re-argue it by the examination of witnesses, or the production of such documents," (being legal evidence,) "as he thinks fit to disprove it." Evidence in reply might in like manner be admitted on a charge of neglect of specific duty, should the prisoner, in his defence, offer evidence to show that severe and acute disease had prevented the execution of the order, the prosecutor not having adverted to such circumstance on the prosecution.

Prosecutor not allowed to complete his case in reply.

603. A defence resting on motive, or qualifying the imputation attributed to facts, now lets in evidence in reply, in those cases only where the prisoner adverts, *by evidence*, to matter which it would have been impossible for the prosecutor to foresee or anticipate. The admissibility of evidence in reply may generally be determined by the answer to the questions: Could the prosecutor have foreseen this?

What evidence for the defence lets in evidence in reply.

(6) Judge advocate general.—Trial of Lieut. General Sir John Murray (3rd Feb. 1815), p. 479.

**EVIDENCE IN
REPLY.**

Is it palpably and evidently new matter introduced by the prisoner? Is the object of the farther inquiry, not to prop up recorded testimony, but to re-establish the character of witnesses, impeached by *evidence* (not by declamation), in the course of the defence? Is it to impeach the character of the prisoner's witnesses?

The prisoner
cross-examines
the witnesses
in reply,

and calls wit-
nesses in
special cases.

604. The prisoner cross-examines such witnesses as the prosecutor may be permitted to call in reply, to an extent, however limited by the examination in chief, that is, restricted to the points or matter on which the prosecutor shall have been allowed to examine in chief. The prisoner also, subject to the conditions under which evidence is allowed in reply, is entitled to adduce evidence in order to re-establish the credit of such witnesses as may have been impeached by the prosecutor's witnesses in reply, and also in the event of the prosecutor having been irregularly allowed to examine as to new matter after the conclusion of the evidence for the defence.

The prisoner's
closing address,

is now a
matter of
regulation, and

may be read
by himself or
a private friend.

**ADDRESS IN
REPLY.**

The prosecutor
may reply, when
witnesses have
been called in
defence.

605. The examination of the witnesses for the defence, or in reply is followed by the closing address of the prisoner. At a general court martial he has no longer an opportunity of observing on the prosecutor's reply, [§ 581] he still has the advantage of having the whole of the evidence for the prosecution before him, as was the custom of courts martial before this advantage was extended to prisoners in the ordinary criminal courts. The prisoner as in those cases where he addresses the court at the close of the prosecution, [§ 583] may apply for time to prepare this address, and he may, as in that case, [§ 586] either read it himself, or ask for leave to have it read for him.

606. The prisoner having made his closing address to the court, or having declined to do so, the prosecutor is entitled to reply. It has been observed, [§ 587] that very great latitude is allowed to a prisoner in addressing the court in his defence, but it is obvious that this does not apply to the prosecutor. Even in those cases where he is also a witness for the prosecution, which under the existing regulations [§ 472 n] will be of very rare occurrence, he occupies an official position, and is bound to act with the most scrupulous candour and fairness towards the prisoner and the court. He ought, in summing up his evidence not only not

to keep back or gloss over any of its weak points, but also, in the words of a former judge advocate general in a very memorable debate, "always to understate rather than overstate" (1) that view of the facts, which it is his duty to bring before the court. If, in the desire to gain a verdict,—and experience has shown that even an official prosecutor may be hurried into very great unfairness by an eagerness to succeed in the duty entrusted to him—the prosecutor should forget the moderation which it is so desirable he should observe, or should attempt to open new ground, or misrepresent the evidence actually given, it is clearly the duty of the court, of their own motion, or at the suggestion of the judge advocate or the prisoner, at once to interpose and check "anything so unfair, so unjust towards the prisoner;" (2) but, as with the opening address, [§570] the prosecutor is not permitted to withdraw any part of the address which he has actually delivered.

ADDRESS IN
REPLY,
to be restrained
by the prosecu-
tor's sense of
moderation
and fair-play.

or otherwise
liable to be
stopped by the
court.

607. The importance of these considerations cannot be too strongly insisted upon in the interests of justice, and fair dealing towards the prisoner. The neglect of them, when brought to the notice of the revising, or the reviewing, authority, may in some cases altogether defeat the legitimate purpose of the prosecution. Conviction on the first charge and sentence of penal servitude, awarded by a general court martial at Rawal Pindee, in March, 1867, (3) was set aside, amongst other irregularities, because the prosecutor in his reply had been permitted to state new facts relating to the case, "in other words," as observed by Mr. Mowbray in his letter to the military secretary, "to give fresh evidence against the prisoner without the responsibility of an oath, and without being subject to adverse cross-examination."

The effect of
an irregular or
unfair reply.

608. The next stage is the summing up of the judge advocate, unless in more simple cases he informs the court that he does not think it necessary. (4) It is invariably in writing, and the court adjourns to enable him to prepare it. This summing up, although from the nature of the case it does not occupy the

Summing-up
of the judge
advocate, if
made, always in
writing.

(1) Mr. Mowbray, H.C. 15th March, 1864.—3 Hansard, CLXXIV. 80.

(2) See Lord Chelmsford's speech, H. L. 26th Feb. 1864.—3 Hansard, CLXXIII. 1168.

(3) Case of Paymaster Cunningham, 88th Regiment. See §571 n.

(4) In a recent case the officiating judge advocate was informed that "there was no necessity for his persisting in summing up, when the court took upon itself the responsibility of deciding upon the evidence without his assistance."—J. A. G. 6th Jan. 1874.

Summing-up of
judge advocate,

entered on pro-
ceedings.

The regulation
disallowing re-
joinder does
not extend to
minor courts,

at which the
custom of
war may still
prevail.

same position in respect to a court martial, as the summing-up of a judge in an ordinary criminal trial, may nevertheless be a great assistance to the members in many cases, especially where, as at home under the present system, officers of standing and experience are available as judge advocates. (5) The summing-up, after being read, is signed by the president and attached to the proceedings. (6) After this, no other address is allowed, and the president orders the court to be cleared, or the court retires to consider its finding.

609. The regulations of 1873 [§ 582] apply to all courts martial in respect to addresses from the prosecutor and prisoner, but only to general courts in respect to the address of the judge advocate, and as to no address being allowed after he has spoken. Inasmuch, therefore, as it is a rule of law that no one shall be deprived of any benefit, except by express words, or necessary implication, and as the order for disallowing a rejoinder in those cases where evidence has been adduced for the defence was in derogation of advantages hitherto conceded to the prisoner, it would seem that the "*instruction*" ought to be taken strictly, and, in the absence of any official decision to the contrary, that the custom of courts martial (7) as to rejoinders is not touched in so far as it affects minor courts martial; and that, as respects soldiers tried before these courts, the impression prevailing in the service, and especially in the ranks, as most emphatically stated by the late Sir Charles J. Napier, (8) still holds good:—"The prisoner has a right to speak last." (9)

(5) Where irregular or improper statements in the reply were not stopped on the instant, but are brought to the notice of the judge advocate by the prisoner or otherwise, it would be his duty to point them out to the court, and neutralize their effect.

(6) Q.R. App. B (6).

(7) See § 82(3) and § 581(1).

(8) Remarks on Military Law, 92.

(9) It may be interesting to give an extract bearing on this subject from a work on courts martial, by Mr. Sullivan, who had been for many years

judge advocate general at Madras:

"After this" (the reply of the prosecutor), "judgment should, in strict propriety, be passed. But as a general court martial is a court of equity, and honour, as well as of law, they seldom or never, in any period of a trial, shut their ears to a prisoner's vindication of his innocence. The prisoner is consequently indulged in a [rejoinder] reply: the judge advocate [sur]rejoins to him if he thinks proper."—*Sullivan on Martial Law* (1784), p. 101.

CHAPTER XVI.

JUDGMENT OF THE COURT.

610. THE next stage of the proceedings of the court martial, (the court being cleared,) is the deliberation with a view to the finding and sentence. A fair copy of the record of the proceedings is generally read over ; indeed, where fair copies are made, it appears but right that the members should have an opportunity of ascertaining that the copy, to which their judgment is annexed, is a correct report of the proceedings. In intricate cases, and where the proceedings are voluminous, the judge advocate is usually prepared with such notes, or index to the evidence, as may assist the court in their reference to the record during their deliberation.

Deliberation.

Proceedings
read over.

611. Absolute impartiality ought most clearly to be the paramount object of the court collectively, and of every individual member. There should be no wish for the guilty to escape, or for the innocent to suffer. No false pity, no undue severity, should influence their judgment. Nor should there be any indolent or hasty adoption of the opinion of another, however clear sighted or experienced, but careful investigation and patience in deliberation should be the aim of each member for himself, and so characterize the judgment of the whole. What Locke has said on the conduct of the understanding, may be well applied to the weighing of evidence in a court of justice : "We should keep a perfect indifference for all opinions : nor wish any of them true, or try to make them appear so ; but, being indifferent, receive and embrace them according as evidence, and that alone, gives the attestation of truth. He that, by an indifferency for all but truth, suffers not his assent to go farther than his evidence, nor beyond it, will learn to examine, and examine fairly, instead of presuming."

Weighing
evidence,the solemn
duty of the
court.

The judge
advocate offers
no opinion.

612. The duty of the judge advocate, at this stage of the proceedings, is simply ministerial—to act as registrar of the court, and to advise on legal points when his opinion may be demanded.

Witness may
be recalled
by court for
particular
question,

613. Though the prosecution and defence is closed, and the court cleared for final deliberation, it is still competent to a court martial, (1) as to a jury, (by whom it is often practised,) to recall a witness for the purpose of putting any particular question deemed essential. The parties must necessarily be present, and cannot be refused permission to cross-examine or re-examine the witness to the extent of the question proposed by the court. The prisoner, moreover, must have the fullest opportunity of meeting the evidence given at this or any other time after his defence is closed.

subject to
cross-exami-
nation.

Opinion :

614. Sufficient time having been given for mutual consultation and deliberation, and it is presumed that, in most cases, each member will desire to review the proof which has been laid before the court on either side, and to consider its bearing as affecting the charge, the president (2) and no longer the judge advocate as formerly, puts some such question as the following, to each member, according to seniority, beginning with the youngest: (2) *From the evidence in the matter now before you are you of opinion that the prisoner is guilty or not guilty of the charge against him?* When there are several charges, they are put consecutively, and where more than one prisoner is arraigned on the same charge, each must necessarily be particularized, and the question repeated with respect to each. The judge advocate usually notes the opinion of each member as he delivers it; but whether this memorandum is to be reserved (3) or destroyed, when the aggregate opinion is recorded, must be left to the decision of each individual judge advocate. The judge advocate swears not to disclose or discover the vote or opinion of any particular member, unless required to give evidence thereof by a court of justice or court martial; he would, therefore, voluntarily and needlessly incur a great responsibility by unnecessarily retaining possession of a memorandum, the loss of which

whether a
written
memorandum
of the vote of
each member
should be
retained.

(1) See hereafter, § 948.

(2) A.W.162.

(3) Mr. Tytler, in the first edition of his work (1800), p. 371, gave his

opinion that it was proper to preserve it;—this he omitted in the second edition (1806) revised by himself, p. 363.

(unless it were made in cipher) might fully reveal the vote and opinion of each member at a glance. Nor can it well accord with the spirit of the oath, to do that unnecessarily, which may lead, in the ordinary course of events, as in case of death, to an exposure of that which it has been the object of an oath to render secret.

615. It is scarcely necessary to observe, that as the concealment of the opinion of each particular member is provided for by an oath, specially framed for the purpose, it would be highly reprehensible to make public the opinion of all by recording that the finding was unanimous. But the terms of the oath have not been held to prevent recommendations to mercy being expressed as the unanimous act of the court.

Opinion not to be expressed as unanimous.

616. Except to pass (4) sentence of death, where *two-thirds* (5) of the members present must concur, (6) the court passes judgment by the majority of voices; and should the court (which usually consists, when sworn in, of an uneven number of members,) be reduced, by death or sickness, to an even number, and their votes be equally divided as to the finding on the whole, or any part of a charge, the prevailing custom of the army is, that the prisoner should have the benefit of an acquittal on such charge or part of charge, (7) the court in this latter case proceeding to award punishment in respect to the remainder of the charge.

What majority is necessary on passing judgment of death.

Votes equally divided, prisoner is entitled to an acquittal.

(4) M.A.8. A.W.116. In 1828 and previous years this provision was worded "no sentence of death shall be given:" in 1829 it was altered to "no judgment of death shall pass," and in 1866 it was altered to the present form, "no sentence of death shall pass."

(5) In calculating the *two-thirds*, the prisoner has the benefit of any broken number: *nine* of *thirteen* were formerly specified, and in like manner it would be necessary to have the concurrence of *four* of *five*, *five* of *seven*, &c.

(6) In the year 1762, Major Colin Campbell, 100th Regiment, was tried by a general court martial at Martinique, for the wilful murder of Capt. M'Kaarg, of that regiment. The sentence of the court was as follows: "The court, on due consideration of the whole matter before them, are of opinion that Major Colin Campbell is guilty of the crime laid to his charge; but there not being a majority of voices sufficient to punish with death, as re-

quired by the articles of war, the court doth adjudge the said Major Commandant Colin Campbell to be cashiered for the same; and it is the further opinion of the court, he is incapable of serving His Majesty in any military employment whatever." In the present day this sentence could not be maintained. On a charge for murder the 143rd and 145th articles provide that the sentence cannot be "contrary to the usages of English law in regard to the punishment of offenders;" but a further provision was added in 1833, that in all cases where the court had convicted any officer or soldier of any offence punishable with death, it might award penal servitude.

(7) The Judge Advocate General (Sir R. Grant), in a letter to the deputy judge advocate in Ireland, 15th January, 1834, gave an opinion to the effect that a court martial being equally divided, the president has no casting voice, and it amounts to an acquittal of the prisoner.

Obsolete
irregularity
of withdrawing
members
above thirteen,

condemned by
His Majesty.

617. To meet the difficulty which might arise from an equal division of votes, it was formerly the occasional practice, on the closing of the court for final deliberation, to withdraw so many of the junior members, as might reduce the court to *thirteen*. This expedient was resorted to on a court martial at Exeter, in 1806, on Quartermaster Heady, 3rd Dragoon Guards, and was strongly animadverted on in the order which promulgated the sentence: "His Majesty having observed, on the face of the proceedings, an entry made on the 28th October, viz. 'of public notice to the parties concerned, that the court consisting of fifteen members, when the opinions of the members are collected, the junior officers will not vote,' has been pleased to command that the court martial may be informed, that they do not appear to have been sufficiently instructed in the practice of courts martial, it being proper, on every account, that every member who is sworn on a court martial, and who has not been prevented from attending should give his opinion, (each party, the prosecutor and prisoner, having a right to such opinion) and His Majesty has therefore been pleased to command that his pleasure should be declared, that the vote of no officer who is sworn on a court martial ought to be dispensed with, merely on account of the number of members exceeding thirteen." (1)

If the judges
are equally
divided in
opinion, no
decision takes
place.

M'Arthur's
opinion as to
the judgment
of courts
martial,

objection
against.

618. Mr. M'Arthur, influenced, no doubt, by the custom, that on questions reserved for the consideration of the judges, a majority only can decide, and that if they should be equally divided in opinion, no decision takes place, gave it as his opinion: "That should there be an equal number of votes on each side, and the several members of the court, upon reconsidering the point at issue, adhere to the first opinion, the question remains undecided." (2) Were this the case, the prisoner might, as elsewhere observed, be liable to be tried a second time, not having been acquitted or convicted; but any advantage which might possibly arise from the opportunity afforded of punishing the guilty, would be infinitely overbalanced by the disrepute in which courts martial might be brought by the public exposure of their fallibility to the soldiery, and by the doubt which would be thrown on the justice of their proceedings.

(1) G.O. 20th December, 1806.

(2) 1 M'Arthur, 259.

619. The practice formerly was that, should the court be equally divided in opinion, the president should be allowed a double voice. It was laid down in a long series of the earlier articles of war, that the sentence should be "according to the plurality of votes; and if there happen to be an equality of votes, the president is to have a casting voice." Notwithstanding the omission of this clause, the custom has survived to the present time, as has before been observed, [§456] in the case of decisions respecting the admission or rejection of evidence, and other similar questions from the necessity of arriving at such a conclusion as may permit the progress of the trial; courts martial, like judges in the civil courts, having absolute power, which they invariably apply, to admit or reject evidence. (3)

The president was formerly entitled to a double vote on all questions;

such is the case only as to questions of evidence or interlocutory decisions.

620. Where several prisoners are tried on the same charge, the finding in respect to each must be separate and distinct. Similarly courts martial cannot give a general verdict of guilty, where the charge comprises several charges or counts, but they must record their opinion on each separately. After finding on each of the charges severally they award punishment for them in the aggregate.

Finding cannot include several prisoners, or be general as to several charges in the aggregate,

621. It is not necessary to find a general verdict of guilt or acquittal upon the whole of each charge or count. The finding may be special, that is, it may state specially which of the facts, as charged, the court finds to be proved, [§821] or, it may amend variances not material to the merits of the case. [§851] Lieutenant Colonel Broughton, 1st West India Regiment, was arraigned before a general court martial, in August 1807, on five charges, the fifth being "for unofficer-like conduct, in making a false certificate on each monthly return, during the time he commanded the regiment, from June 1806, to the present period, viz. that he had read the articles of war to the men under his command, whereas the articles of war have neither been read by him, nor any other person by his order, during that period, to the prejudice of the service." With respect to this charge, the court was of opinion, "that the prisoner was not guilty to the extent laid

but may be special on each part of charge.

General order correcting erroneous impression as to general finding.

(3) The prisoner, prosecutor, or judge advocate may bring any evidence assumed to be improperly admitted or rejected (§ 576) by a court martial, or any interlocutory decision under the special consideration of the sovereign, or the officer authorized to confirm the sentence, as questionable evidence, admitted by a judge, may be brought to the consideration of the judges.

Declaration of
His Majesty to
that effect.

in the said charge, inasmuch as the prisoner was thereby charged with signing a false certificate on each monthly return, during the time he commanded the regiment, from June 1806 to the present period ; and it appearing from the evidence that, in some of the months during that time, he did not sign such false certificates, the court did, therefore, acquit him of the said fifth charge ; but was of opinion, that the prisoner was reprehensible for his inadvertency and want of proper caution, in not examining every certificate previously to his signing it, which it was his duty so to have done." His Majesty was pleased to approve and confirm the sentence of the court martial upon the first, second, third, and fourth charges, but not to confirm the finding of the court upon the fifth charge, " as it appeared to have proceeded upon the *erroneous supposition* that a court martial are bound to find a *general verdict* of guilt or acquittal upon *the whole of every charge* ; and as the court have expressed their opinion, that the prisoner was guilty of a part of the fifth charge, they might, in conformity to that opinion, have found him guilty of that *part of it*, and have acquitted him of the *remainder*, instead of acquitting him generally of the whole." (4)

Finding may be
special, but the
court must
acquit or
convict on
each part.

622. Not only may the court find the accused guilty of the facts to a certain extent, and acquit him of the remainder, but when the whole of the facts have been proved, the imputation grounded on them may nevertheless be thrown out (5) either entirely or partially ; or no criminality, or a less degree than that charged, may be imputed by the court ; [§ 834-8] or a minor offence may be found, if included in the greater offence of the same kind, which the evidence has failed to prove, as charged ; [§ 831] the prisoner must, however, be unequivocally acquitted or convicted of every charge and every part of each of the several charges of which he stands accused :—and in reference to this it may be added that in case of alternative charges [§ 396] it is not sufficient, under the impression that the alternative necessarily falls to the ground, to convict as to the one, without expressly acquitting of the other.

Finding should
be precise ;

623. Courts martial would do well to define the degree of guilt which they impute to the prisoner, or of which they find him guilty, or the extent to which they may deem the accu-

(4) G.O. 26th January, 1808.

(5) G.O. 416, and G.O. 424, 4th charge ; see also § 839.

sation proved; and particularly upon constructive charges, where the essence of the charge, and the applicability of an express punishment, may rest on imputation built or grounded on the facts. [§831-855] Such discrimination is desirable, not only in order to observe an apparent consistency as to the sentence, when contrasted with other sentences on convictions upon similar charges (the sentence with the finding and charges only being published to the army,) but to render the subsequent duty of the court, in awarding punishment, clear and unobstructed. (6)

624. Until the issue of the regulations of 1868 it had been customary, when the court had found the prisoner "not guilty" of the whole of the charge, immediately to proceed to enter an acquittal. "*Therefore*" acquits the prisoner was the invariable formula, and it was much the custom to attach some epithet to an acquittal which was intended to be clearly and decidedly satisfactory. The forms *honourably, most honourably, fully, most fully, fully and honourably, most fully and most honourably*, were often used, and when the charge bore on the honour of the accused, or where the charges were satisfactorily disproved, it was held (adverting to the prevailing custom), but justice to adopt one or other of them, "*honourably*" not being used in any case where the charge, if proved, would not have reflected on the prisoner's honour. The instruction for the first time inserted in the Queen's Regulations in 1868 lays down:—"In all cases when the court acquit the prisoner, the finding is to be recorded in simple terms 'Not Guilty.' If on the trial of a commissioned officer they desire to acquit the prisoner honourably, they are to state so in a separate letter." (7)

Forms of
acquittal
heretofore
established
by custom,

are forbidden
to be used
by the existing
regulations;
and no substi-
tute is provided
in the case of a
soldier.

(6) A not unusual form of finding, when the court intends to acquit the prisoner of a part of the charge, "guilty . . . with the exception of ——" is open to the objection that the record of conviction may in some cases raise a prejudice against the prisoner. This is not the case when the preferable form is adopted—"guilty of . . . and not guilty of the remainder of the charge."

(7) Q.R. App. B (7). The improvement upon the old custom of embodying the honourable acquittal in the body of the proceedings is not at once apparent, and there is this disadvantage, that apart from the liability to be lost or mislaid, not to mention the mul-

tiplication of documents, a separate letter is not necessarily promulgated with the sentence of the court, and the effect of it, as regards the service in general, is lost to the prisoner.

The Queen's Regulations, under the head of "Treatment of Soldiers" (Q.R.S. 6, p. 2), lay it down as a principle, "It is desirable to keep up in all ranks of the army a proper feeling and high sense of honour." The Duke of Wellington, in his orders in the Peninsula, knew well how to make appeals to this feeling in support of the principle of duty; and his view of an honourable acquittal as it affected both officers and soldiers will be read

as is
also the excep-
tionable form,
*Charge not
proved.*

The finding
ought not to
be ambiguous.

625. This instruction also precludes the use of the form, *the charge not having been proved*, which courts martial had at one time occasionally used. It was always questionable whether such an acquittal ought to have been recorded. In the literal sense, no better reason could be given for an acquittal than that *the charge had not been proved*;—such must, in fact, be the grounds of every acquittal. But as expressing the reason was unusual, the innuendo conveyed by it appeared unjustifiable, and it might have been more injurious to the prisoner than a qualified verdict of guilt, particularly in cases affecting the honour and respectability of an officer. Ambiguous sentences ought the more to be avoided, because it is not in the power of the accused, by any representation or exertion, to procure the re-hearing of the case by a court martial. The court is bound to administer justice according to the *evidence* (the actual evidence) in the matter before it; *the point in issue is to be proved by the party who asserts the affirmative*; it is not competent to a court martial to frame a verdict on the absence of evidence or the want of proof, though it may obviously and necessarily result from it. In such circumstance, the acquittal ought to depend on that just and reasonable principle of English law: *Innocence is to be presumed till the contrary is proved.* The language

with interest:—"It is difficult and needless at present to define in what cases an *honourable* acquittal is peculiarly applicable; but it must appear to all persons to be objectionable in a case in which any part of the transaction, which has been the subject of investigation before the court martial is disgraceful to the character of the party under trial. A sentence of honourable acquittal by a court martial should be considered by the officers and *soldiers* of the army as a subject of exultation; but no man can exult in the termination of any transaction a part of which has been disgraceful to him; and although such a transaction may be terminated by an *honourable* acquittal by a court martial, it cannot be mentioned to the party without offence, or without exciting feelings of disgust in others: these are not the feelings which ought to be excited by the recollection and mention of a sentence of honourable acquittal. I believe that there is no officer upon the general court martial who wishes to connect the term honour with going to a brothel; the common

practice forbids it, and there is no man who unfortunately commits this act who does not endeavour to conceal it from the world and his friends. But the honourable acquittal of Lieut. ———, as recorded in this sentence, which states that he was concerned in an affray which is known to have originated in a brothel, will have the effect of connecting with the act of going to a brothel the honourable distinction which it is in the power of a court martial to bestow on those brought before them on charges of a very different nature, by the sentence which it may pass upon them.

I therefore anxiously recommend to the general court martial to omit the word *honourably* in their sentence.—Letter to President, Lisbon, 12th Oct. 1809.—*Wellington Despatches* (1838), v. 221-2.

It may be added that it would be as incorrect to record an honourable acquittal of a prisoner on a charge not affecting his honour, as it would be illegal, and contrary to every principle of equity, to find a greater degree of guilt than that charged.

of the judgment in this, as in every other case, should be free from ambiguity and not exposed to malevolent interpretation.

626. Upon a finding of guilty, either of the whole or of any part of the charge, the court, when the prisoner is an officer, re-opens only in those cases where the judge advocate has been informed that there is evidence of previous convictions. In the case of a soldier it must necessarily re-open, as the Queen's Regulations (1) require the court at this stage of the proceedings to "enquire into and record the prisoner's former convictions (if any), and any sentence which he may be undergoing; also his age, date of attestation, service allowed to reckon towards limited engagement, his general character, and any decorations, medals, G. C. badges, or other honorary rewards of which he may be in possession. These particulars are required for the guidance of the court in awarding punishment, (2) as well as for that of the confirming authority in sanctioning the award. The evidence under this head (3) is to be given whenever possible by a commissioned officer who is not a member of the court."

PROCEEDINGS
BEFORE
SENTENCE.

Upon a finding of guilt, the court re-opens for enquiries as to previous convictions and general character, &c.

627. This regulation applies only to the case of "a soldier," nor was any provision made for the reception of evidence of previous convictions against an officer before the mutiny act of 1847, when the court was empowered to receive evidence against "any prisoner." (4) This was more distinctly expressed in 1857, as "any person subject to the articles;" but an exception as to commissioned officers (5), in respect to convictions by courts of ordinary criminal jurisdiction, was then inserted, and it was retained until the year 1863, when it was omitted.

Previous convictions may in like manner be proved against officers.

628. The corresponding clauses in the mutiny act were omitted in 1860, and the article of war,—as it now stands,

The amended article as to enquiries as to previous convictions.

(1) Q.R. App. A. 8 [§648].

(2) Sir R. Peel's Act in 1827 (7 & 8 Geo. 4, c. 12, s. 11) first introduced the system of giving previous convictions in evidence in order to more severe punishments; and Article 88 of the articles of war of 1829 first authorized a similar practice in the army.

(3) This last sentence, was added to the Queen's Regulations in 1859, and the remainder of it was worded, "is invariably to be given by a commissioned officer."—See § 634.

(4) The Queen's Regulations con-

tinue to require the officers' court martial book "to be kept as a confidential document by the commanding officer of every regiment and depôt."—Q.R. S.23.p.40.

(5) There is no authority for any enquiry by a court martial as to the general character of an officer. Indeed, in the case of an officer, the receiving of any evidence to this point, unless brought forward on the defence, would be prevented by considerations which do not apply to the record judgments of courts of justice.

after successive alterations from the first introduction of this enquiry in 1829,—is as follows: (6) “After any person subject to these articles has been found guilty by court martial of any offence, the court may, for the purpose of assisting their discretion in awarding punishment for the offence, receive evidence of former convictions against the prisoner, whether convictions by court martial or convictions by a court of ordinary criminal jurisdiction. The court, however, shall not in any case award any other punishment than may be legally (7) awarded for the particular offence of which the prisoner has been found guilty.”

Sufficient
evidence of
convictions
by courts
martial;
by civil courts.

629. The hundred and fifty-fifth article of war provides that previous conviction by court martial may be proved by the entry thereof in the court martial book or defaulters book, or by certified copy of such entry. Convictions by a court of ordinary criminal jurisdiction are proved by production of the certificate, provided for in the 39th section of the mutiny act (8) by certified copy of such certificate, or by the entry of such conviction in the court martial book or defaulters book, or by certified copy of such entry. The article also provides that no entry of a conviction by a court of ordinary criminal jurisdiction shall be made in the court martial book or defaulters book, except upon such certificate as aforesaid. (9)

Certificate
to be used
in court.

630. The certificate is read in court, signed by the president and attached to the proceedings. (10) It is not ne-

(6) A.W.154. It has been ruled that the omission of the enquiry—the article being permissive only, “the court *may*”—does not invalidate the sentence; and it is obvious that in many cases the necessary evidence could not be forthcoming.

(7) For “legally” former articles had read “by the mutiny act, and by these our articles of war.”

(8) “Whenever any officer or soldier shall have been tried by any court of ordinary criminal jurisdiction, the clerk of such court or other officer having the custody of the records of such court, or the deputy of such clerk, shall, if required by the officer commanding the regiment or corps to which such officer or soldier shall belong, transmit to him a certificate setting forth the offence of which the

prisoner was convicted, together with the judgment of the court thereon if such officer or soldier shall have been convicted, or of the acquittal of such officer or soldier, and shall be allowed for such certificate a fee of three shillings.” M.A.39.

(9) A.W.156. The convictions by the civil power, which are to be produced in evidence, are limited (Q.R. S.23,p.42) to those which exceed that which a commanding officer is empowered to award summarily.

(10) A.W.156. The form is given, Q.R., end of App. B (14). One of the columns in this form is “Charges upon which tried,” which the article does not require to be given in evidence; and the mention of which may, in cases of partial acquittal, operate to the prejudice of the prisoner.

cessary to prove the signature or official character of the person appearing to have signed either of the above-mentioned certificates; nor if the court be satisfied from all the circumstances of the case that the prisoner under trial is the person mentioned therein, is it necessary to give other proof of the identity of the person of the offender. Where an offender has passed under different names, his convictions will of course appear under the name he bore at the time, (1) and evidence may then be given as to his identity, as in other cases, if required by the court. Such convictions may be either by the civil court when in a state of desertion, or by court martial when serving in another regiment under a previous, or a fraudulent, enlistment.

Whether convicted in his own or under different names the identity of the prisoner must appear to the court.

631. It is scarcely necessary to remark, on the re-opening of the court to receive evidence of previous convictions, the parties to the trial being admitted, that the prisoner, if he should desire to do so, has a right to examine witnesses or to produce evidence to rebut that brought against him. It must however be understood, that the only fact put in issue on the enquiry as to previous conviction, is the conviction itself.

The prisoner is present, when evidence as to convictions and character is received; and may produce testimony to rebut that brought against him; the only fact in issue being the conviction.

632. The seventy-eighth article [§211] directs, "In every case where a soldier is found guilty by a court martial of drunkenness, whether on duty or not on duty, the court shall, for the purpose of assisting their discretion in awarding punishment, receive evidence of all former entries of drunkenness against the prisoner in the regimental, company, battery, or other defaulter's books."

Evidence of entries of drunkenness.

633. The mutiny act and articles of war are altogether silent respecting enquiries as to previous character. Courts martial were formerly authorised, if they thought fit, to enquire by evidence into the general character of the prisoner, "to enable it to mete out punishment so as to satisfy the ends of justice with greater precision. (2) Now when a soldier has been found guilty, they are required always to enquire into this, and the other particulars specified in the regulations, [§626] for their own guidance "in awarding punishment, as well as that of the confirming authority in sanctioning the award."

GENERAL CHARACTER. Enquiries as to general character, age and services and class, are now imperative, in the case of a soldier.

(1) Letter, J.A.G., 18th Oct. 1831. See § 390.

(2) Circular—Horse Guards, 24th Feb. 1830. See G.O.(1872)91, § 648.

An officer of the prisoner's company, ought, if possible, to be examined on this point.

634. It does not appear desirable to resort to the adjutant for evidence as to character, the captain of the prisoner's troop or company is clearly the most proper person to speak to this point. The regulation now cancelled prohibited a non-commissioned officer (3) ever being called upon, even when the only officer present, who may know the prisoner, should happen to be the prosecutor, and no other officer, who knew the prisoner, could be made available; and the revised regulation points out that, whenever possible, the officer called upon should not be a member of the court.

Enquiry cannot be extended to particular acts of misconduct;

635. It is particularly to be noticed that the enquiry is confined to the *general* character of the accused; particular offences cannot be referred to, much less can the circumstances, connected with offences for which the prisoner may have been formerly tried, become the subject of renewed investigation. Neither can it with propriety be stated, without referring to the offences, that the prisoner has been confined a certain number of times within a specified period. A witness examined with a view to general character may, in order to refresh his memory, [§959] and to be better enabled to answer the general questions, refer to the defaulter's book; but he cannot be permitted to read from it, to lay it before the court, or to state the facts which it records. He must be restricted to a *general* opinion, which he cannot be permitted to support by reference to *particular parts* of the conduct of the prisoner; as it would at once, and without any notice, put him on his trial for every act of his past life which may be referred to. It will be for the accused either to submit to the imputation cast on his *general* character; to meet it by conflicting testimony; or, if he think fit, to cross-examine the witnesses, as to their means of knowledge,

witnesses restricted to general opinion of prisoner;

prisoner may cross-examine as to grounds of opinion.

(3) See §628(3). The contrary practice had been previously forbidden in the standing orders of many local commands. The objection, to the practice of non-commissioned officers appearing to give this evidence, was so well put in the standing orders of the Northern District, by the late Sir Charles J. Napier, when he held that command, that no apology will be required for appending the following extract:—"The major general wishes it to be understood that his objection to non-commissioned officers being ex-

amined by courts martial as to the character of prisoners, does not arise from any want of confidence in the honour of this highly respected body of men, but because he considers it a reflection upon the officer of the company who is thus passed over, as it implies an ignorance of the soldier's character, and no man is fit to hold a command, who is not acquainted with his men, and ready to speak for or against them, as the truth demands."

and as to the facts or grounds which may have led to the opinion given. (4)

636. The court, having found a verdict of guilty, or having again closed after disposing of such proceedings as may have arisen on enquiries as to previous convictions, general character, service, and the other particulars required by the regulations, [§ 626, 648] proceeds to pass sentence. It is to be observed, that, on a finding of guilt, there is no room for farther deliberation, when the punishment to be applied to the particular offence is in any case peremptorily enjoined. [141-2] The act of the court in passing sentence is then ministerial, and, in that case, it will be the duty of the judge advocate, [§ 469, 470] and also in those cases where the court is assembled in default of a competent civil tribunal for the trial of civil offences, to point out the law which bears on the question.

SENTENCE ;

guilt being pronounced a prescribed sentence, in certain cases, is necessarily recorded.

637. Notwithstanding the conflicting opinions, (5) the prevailing custom of the army is, that each member should give his vote as to the nature and degree of punishment, though he may have voted for acquittal. The majority, in every case, binds the minority ; the opinion of the majority

Each member to give his vote for punishment,

(4) § 826. In confirming the sentence upon Private William Barry, 3rd Bengal Europeans, General Lord Clyde observed:—"The Commander in Chief was much surprised to observe that this soldier's general character was described as "indifferent," notwithstanding that he has been only twice before the commanding officer since March, 1856, and not even before the commanding officer of his company for any serious offence since October, 1857. Officers giving evidence as to character should be very careful as to the term they use, that the soldier may not be able, by cross-examination, to show that he has been unjustly stigmatised." — G.O. (India), 21st Sept. 1859.

(5) Mr. Tytler (Essays, p. 312) gave it as his opinion those members who have voted for an acquittal may vote on the question of punishment, in order to render it as mild as possible. But if the award of punishment ought to be guided by the personal opinion of members, would it not, under this supposition, be a violation of justice, and of the oaths of those members who

voted for an acquittal, to award the slightest punishment? If an inconsiderable punishment were awarded by the minority, with a secondary view, and that to countervail the consequences of conviction by the majority; as well might the majority vote for an excess of punishment, not proportioned to the finding, to allow for the neutralising effect of the votes of the minority, and thus to re-establish the effect of the conviction, and preserve the decision of the court inviolate.

Mr. M^r Arthur, following Sir Charles Morgan, argued that the prisoner ought to have the presumptive opinion of those members who have absolved him, thrown into the scale with the voices of those who incline to the lesser punishment. (2 *Courts Martial* (1813), 314.) Such practice would undoubtedly relieve members, who vote for acquittal, from awarding punishment where, according to their private judgment, none is due ; but it would not obviate the other inconsistencies which must arise from members acting independently, and not in consequence of the aggregate opinion of the court.

adequate to the degree of guilt found by the majority.

This duty is imposed by the court martial oath.

Officer tried for refusing to award punishment.

is the opinion of the court. As a court martial acts in the twofold capacity of judge and jury, and as the law has nowhere entrusted this last, or any other, function to a *part only* of the court, it would seem that the court, having performed the duty of jurors in finding a verdict, is imperatively required by the law to proceed, in the character of judges, acting *independently* of their individual votes as jurors, to award a punishment *equal and adequate to that* degree of guilt of which the prisoner *has, by the court*, been adjudged and declared guilty.

638. In cases not discretionary, it necessarily and inevitably follows that the punishment is in accordance with the finding of the court, and cannot be alleviated by the individual opinion of a member as to the guilt or innocence of the prisoner. Members swear that they will administer justice, according to the articles of war; now these articles appoint fixed penalties on *conviction* of stated crimes and, on *conviction* of other crimes, render the offender liable to certain punishments. Conviction takes place upon the opinion of the majority, and cannot, without a gross violation of consistency, be rendered nugatory, or contravened by a subsequent act of the minority. On an interlocutory decision as to the admission or rejection of evidence, as well might the minority, which voted for rejection, discard from their minds, or decline to be influenced by, the testimony, which, according to their *individual* judgment, was irregularly admitted.

639. In the year 1834 the judge advocate general was required to give his opinion on this most important point by the general commanding in chief (Lord Hill). It altogether confirms the view which is here taken on the subject of members voting on the question of sentence, whatever may have been their individual vote on the finding by the court. Some years after the author's remarks had been published in the earlier editions of this work, it was made known to the army in India on the following occasion:—An officer was placed in arrest by the president of a regimental court martial, and brought to trial before a general court martial held on the 6th March, 1839, on a charge for irregular and unofficerlike conduct in twice refusing to perform his duty as member of a regimental court martial, when called upon to do so by the president of the said court. Upon evidence being required

before the court, and the obligation to secrecy being thus at an end, it was alleged on the part of the prosecution that this officer had refused to vote on the question of punishment, he having voted for a finding of not guilty. The court acquitted the prisoner, which sentence was disapproved by the commander in chief at the presidency, and by him referred to the commander in chief in India (Sir H. Fane), whose remarks, dated 29th May, 1839, made known to the army the above-mentioned ruling of the judge advocate general: "Upon a finding of guilty by a court martial, I am of opinion, that although all the members of the court may not have concurred in it, it must be deemed the finding of the whole; and the members who voted for acquittal may be called upon to vote upon the punishment to be awarded on the prisoner as if they had concurred in the finding of guilty."

Opinion of the judge advocate general.

640. Where the court has convicted the prisoner, it is bound in every case, with the one exception suggested by the peculiar form of the hundred and fourth article of war, [§ 229] to award some punishment, although it may recommend the remission of it.

Some punishment must be awarded whenever guilt has been found.

641. Where the opinions of members differ as to the nature of the punishment, it is usual to separate the question, and, before entering on that of the *quantum*, to ascertain the *nature*: the majority must decide, nor is it enough that this majority should be *relative*, it must be *absolute*: it is not "sufficient that a greater number of votes should be given for any *one* punishment than for any other punishment, unless that greater should form a majority of the whole." (6) In every case of sentence of death [§ 616] two-thirds of the members present must concur; and, where they do not, the president must again take the votes of the court as to punishment other than death.

Where opinions differ as to the punishment, the majority decides;

absolute majority in all cases.

Two-thirds in capital cases.

642. After the nature of the punishment has been decided on, it was an expedient, not unfrequently resorted to at the beginning of the present century, when the members differed as to the quantum of corporal punishment, imprisonment, or transportation, for the aggregate amount awarded by all the members collectively, to be divided by the number of members constituting the court, in order to determine the number to be inserted as the punishment, all broken portions being discarded in favour of the prisoner; but this practice was decidedly

Fixing punishment by taking an average is illegal.

erroneous, as the opinion of the majority of the court must have been often overruled; whereas in this, as in every case, as above stated, the opinion of the majority ought to prevail.

Votes being equal, the more lenient sentence awarded.

Punishment fixed according to the revised votes of the majority,

but none can be awarded where the court is finally divided.

Wording of sentence

to conform to the wording of the mutiny act or article of war, without quoting them.

Capital punishment.

Penal servitude.

643. Should the court be equally divided as to the nature or quantum of punishment, the prisoner, in most cases, has the benefit of the more lenient judgment, by the condition which requires an absolute majority for the award of punishment being satisfied, some member, or often the whole court, being found, on reconsidering the question, to have coincided with that opinion which leans to the side of mercy. Whatever the first impression of members, the ultimate opinion of the majority must determine the amount and nature of punishment. If, however, in any case the court should continue to be equally divided, a note of the fact must be entered on the proceedings, and the court must adjourn and report to the convening authority.

644. With respect to the wording of the sentence, in all cases of joint trial, it is necessary that it should be drawn up separately for each prisoner. In cases *discretionary* with the court, no special form of sentence is necessary to its legal effect; it should obviously be expressed in clear and unambiguous language. The regulations prescribe appropriate forms in certain cases, hereafter specified. When a part of the sentence is obligatory, such as *reduction*, it precedes the award of any other punishment. The court should adhere as literally as possible to the terms of the statute or article of war, by virtue of which the punishment is awarded; but it is forbidden, nor would it be advisable, to refer expressly to any particular section or article. (1)

645. *Capital punishment* may be executed either by shooting or hanging: for mutiny, or other military crimes, commonly by *shooting*; for desertion to the enemy, or for plundering, when punished by death, sometimes by hanging; and for murder not combined with mutiny, for treason, and piracy accompanied with wounding or attempt to murder, which are the only civil offences now punishable with death, necessarily by *hanging*, as the sentence must accord with the usages of English law in regard to the punishment of offenders.

646. Transportation has now been replaced by penal servitude in every case. [§ 114] This, as was transportation, being a punishment equally unknown to the common law of

(1) App.A.p.13.

England, to the custom of its ancient military courts, and to courts martial, cannot be awarded except in cases expressly provided for by the written law, which have been already specified [§ 109, 205] in so far as relates to military crimes. Penal servitude.

647. Whenever penal servitude can be awarded for military offences by courts martial, the period is discretionary, and may be either for life or for a term not less than five years. (2) Every term of penal servitude is reckoned as commencing on the day on which the original sentence (that is to say, whether it may have been revised or not), was signed by the president, (3) except in any case where an offender may be already under sentence of imprisonment or penal servitude, and the court awards a sentence of penal servitude to commence at the expiration of the imprisonment or penal servitude under the former sentence. (4) Term, at discretion of court, commences on day of signature of sentence,

or at expiration of former sentence,

648-667. A general order dated 1st November, 1872, (G.O.91) directs: "When a general court martial shall direct its sentence of penal servitude to commence (under the one hundred and thirty-eighth article of war) at the expiration of any other sentence of imprisonment or penal servitude under which the offender may be at the time, *the day upon which such penal servitude is to commence* is to be specified in the sentence of the court. To enable the court to specify such day, it shall, upon proof that the prisoner is already under any sentence or sentences, obtain evidence as to the date or dates of the expiration thereof." (5) in which case the date is inserted in sentence.

668. It is not competent to a court martial to sentence *incapacity* to serve Her Majesty in any situation, civil or military, there being no longer any case specially declared to be so punishable by a court martial. (6) This appears from the order which promulgated the sentence of a general court martial held at Halifax, in 1816, on Lieutenant Harry Thomas Heath, 7th Battalion 60th Regiment, who was found guilty of desertion, and sentenced to be cashiered and rendered incapable of ever serving His Majesty again in any Courts martial cannot sentence incapacity to serve, except in cases specially provided for;

(2) A.W.116. For crimes against nature [§ 1154] the minimum is ten years, but in other cases of penal servitude under the criminal law, it may range from a minimum of five years to the term of life, with the alternative of imprisonment.

(3) A.W.139.

(4) M.A.28. Q.R.App.A.p.15. A.W. 138.

(5) This order has not been embodied in the regulations of 1873, and it is obvious that it is inapplicable in the case of the sentence of a previous court martial not promulgated, or of a confirmed sentence being quashed.

(6) See M.A.87.

capacity: His Royal Highness the Prince Regent has been pleased, in the name and on the behalf of His Majesty, to approve the finding, and confirm so much only of the sentence as adjudges the prisoner to be cashiered; the court not being authorized to adjudge the remaining part of the sentence for the crime of which he, Lieutenant Heath, has been convicted.”(7) That a court martial may, in its sentence, declare *unworthiness* or *unfitness* to serve, is evident from the award of many courts martial approved by the sovereign, particularly that on Lieutenant General John Whitelock. (8)

may award
unworthiness
or unfitness;

cannot use the
words *is*
cashiered ac-
cordingly.

669. A court martial is incompetent to award, in any case, that the prisoner be cashiered and *is hereby cashiered accordingly*. (9) By the adoption of such words, the court exceeds the power and authority vested in them, which must be apparent on a moment's consideration, as cashiering does not take place, nor is the sentence in any case operative, until confirmed. Such sentences by naval courts martial are not incorrect, because the award of the court takes effect upon being pronounced in open court.

Reprimands,

public,

private;

and admonition;

670. Reprimands vary from a public and severe reprimand to a private reprimand or admonition. [§115] Reprimands are sometimes administered, and in certain cases apologies exacted in conformity with the sentence, in the presence of the court martial re-assembled for the purpose, (10) or in the presence of a corps of officers. When public, a reprimand may also be administered at the head of a regiment, brigade or division, paraded for the purpose of being present at it; or it may be conveyed in general orders. A private reprimand is usually given by the commanding officer of a regiment or brigade, at his quarters, in the presence of the officers of the regiment; or of the officers of equal and superior rank only, or simply in the presence of a staff officer. Admonition is either implied by the terms of the sentence,

(7) G.O.412.

(8) G.O. 8th November, 1808.

(9) G.O. 1st July, 1814; 6th March, 1816; 8th March, 1815.

(10) See the sentence of the court martial on Colonel Hugh Debbieg, of the Engineers, tried in 1784 for writing disrespectfully to and concerning the Duke of Richmond, master general of the ordnance. (2 M'Arthur, 359.) See also a very extraordinary sentence

on Lieutenant Colonel Walcot, 5th Foot (Samuel, 379), who was tried during the American war, for striking a subaltern (Ensign Patrick) under his command. He was suspended from pay and allowances six months; and the court was further pleased to order that Ensign Patrick should draw his hand across the face of the lieutenant colonel, before the whole garrison, in return for the insult he had received.

or conveyed by a superior or commanding officer, and commonly not in the presence of witnesses, except perhaps the personal staff of a general officer or the adjutant of a regiment. The manner, and also the time, of delivering the admonition or reprimand is appointed by the confirming authority.

are inflicted as may be directed by the confirming authority.

671. Courts martial in cases of disrespect to superior officers, or in consequence of quarrels, have occasionally dictated written and verbal apologies. There was a very noted instance in 1783, when Lieutenant General Murray, who had been commander in chief at Minorca, was tried by a court martial on charges arising out of his defence of Fort St. Philip and alleged personal pique towards Sir William Draper, a general officer under his command. From circumstances which came under observation in the course of the trial, the court apprehended unpleasant consequences when the restraint of the court martial should be taken off, and therefore entered some remarks on the minutes of their proceedings for the consideration of His Majesty, making known the temper and disposition of the parties towards each other. His Majesty was pleased to approve entirely the part taken by the court; and directed it to be re-convened to take into consideration the whole of the circumstances connected with the affair, and "to propose some mode of accommodating the dispute, by such explanation, acknowledgment, and concession, on either part, as the occasion may seem to require, and which may, in the opinion of the court, consist with the honour of the parties, and their character as officers: and it was His Majesty's further pleasure, that, convening the parties before them, the court should exert its utmost endeavours to induce a reciprocal acquiescence in such honourable terms of accommodation, and to obtain from each a solemn engagement, that the difference should terminate and have no further consequences; to which end the court was armed with His Majesty's permission to use his royal name, authority, and injunction; as also, if it should see occasion to impose a strict arrest upon both parties, until a report should be made of the matter to His Majesty." The court met accordingly, and proposed such mutual apology as the case appeared to demand. Sir William Draper declared his readiness to regulate his conduct by the judgment of the court, but General Murray objected to

Apologies dictated.

Case of Lieut. General Murray and Sir W. Draper.

Orders respecting, by the King.

Proceedings of court thereon.

the terms of the apology; whereon the court exacted from Sir William Draper a pledge of his honour that no adverse measures should originate from him, and remanded General Murray, subject to his arrest, which His Majesty directed to be made close, and which was not enlarged till he had pledged himself to the same effect with Sir William Draper. A correspondence, in the meantime, ensued between the judge advocate general and General Murray, in which the former, to induce the general to acquiesce in the decision of the court, stated that His Majesty entirely approved it; but the general's sense of duty to His Majesty was opposed by his repugnance to sign the requisite apology, as he was called on to express *concern*, which he stated he could not do with truth. The general, however, proposed a declaration which, in other respects, exceeded that prescribed by the court; but the words "I think it very unfortunate." superseded those, "I express my concern." This suggested apology was ordered by His Majesty to be laid before the court, "who, following the humane condescension of His Majesty," yielded their consent to its reception in the place of that dictated by them. The parties accordingly appeared before the court, and, upon their complying with its award, the matter ended.

Courts martial ascertain that the sentence can be carried into effect; must require a surgeon's certificate.

Corporal punishment,

terms to be observed in awarding,

imprisonment may be added.

672. Courts martial, (1) before passing sentence, should ascertain that the state of health of the prisoner will admit of the sentence being forthwith carried into effect. With this view, a certificate, (2) from a medical officer, in his own handwriting, according to a prescribed form, is to be required by the court, and attached to the proceedings.

673. In the special cases where corporal punishment may be awarded, [§119] it is limited to fifty lashes. (3) It had been customary to use the words, "*in the usual manner.*" The omission of the words "*on the bare back,*" would not now convey a power of inflicting the punishment on the back and breech, which in the earlier years of the present century, it was held to do in aggravated cases of theft, misbehaviour before the enemy, and other unmanly crime.

674-9. General, and district or garrison courts martial have the power to combine corporal punishment and imprison-

(1) Q.R.App.A.p.12.

(2) Q.R.S.6.p.61.

(3) M.A.22. A.W.118.

ment, (4) which they did not possess until corporal punishment was in every case limited to fifty lashes in the year 1847.

IMPRISONMENT.

680. In those cases where courts martial award sentences of imprisonment upon officers, there is no authority, as has been already observed, [§115*n*] for solitary confinement. But in all cases of imprisonment it may be with or without hard labour, and its duration is limited by positive enactment, (5) to two years, by general, and district or garrison courts martial [§121] and to a period of forty-two days in the case of regimental or detachment courts martial. (6) The court may direct that a soldier may be kept in solitary confinement for *any* portion or portions of *such* imprisonment not exceeding fourteen days at a time, or eighty-four days at different times in any one year, with intervals of not less than *such* periods of solitary confinement between the periods of solitary confinement. (1) When any court martial, whether general, garrison or district, or regimental, shall direct that the imprisonment shall be solitary only, the period shall in no case exceed fourteen days. (2)

Of officers,
not solitary,

of officers or
soldiers, with
hard labour.

Extent limited.

A sentence of
solitary confinement on a
soldier cannot
exceed three
lunar months
in one year, and
in no case
fourteen days
without an
interval.

681. In situations in which it may be impracticable to put in execution sentences of solitary confinement, the officer convening the court is required by the hundred and twenty-second article of war to give instructions to the court to that effect, and the court, in awarding a sentence of imprisonment, is required to govern itself accordingly. (3)

In certain
situations the
court is not to
award solitary
confinement.

682. The regulations require courts martial in passing sentences of mixed imprisonment to leave it to the discretion of the governor of the prison to appoint the precise period or periods at which the offender shall undergo the solitary confinement. They are however, in wording their sentence, carefully to comply with the directions contained in the articles of war respecting the length of the periods of solitary confinement, and the intervals between such periods. (4)

Courts martial
do not fix the
precise periods
of solitary
imprisonment.

683. With reference to the aggregate amount of the periods of solitary confinement, which may be legally awarded, it is to be observed that the limit of eighty-four days applies only to the quantum of solitary confinement, to which an offender may be subject in the course of the

The limitation
as to solitary
confinement
has not any
reference to
any antecedent
imprisonment,
within the
space of the
same year.

(4) M.A.23. A.W.119.

(5) M.A.8. A.W.116.

(6) M.A.27. A.W.129.

(1) A.W.126.

(2) A.W.121.

(3) Such instruction is given with

reference to Milbank, as that prison is conducted on the separate system.—Q.R.App.B.(9)*b*.

(4) Q.R.App.A,p.14. The form of sentence is given, Q.R.App.B(9), sentences, *g* and *h*.

imprisonment, by any one sentence, in any one year, not by the aggregate of sentences in any one year. "That is," in the words of the judge advocate general, whose opinion is here quoted, "the limit of eighty-four days has not any reference to any antecedent imprisonment within the space of the same year." (5)

Courts martial do not award simple imprisonment, when they have reason to suppose that the prisoner will be committed to a military prison.

Course to be pursued when medical certificate given in qualified form, and form of award.

Duration of imprisonment in ordinary cases, not to exceed six months,

except for aggravated crimes, and with reference to extremes of heat and cold.

684. No provision having been made in the military prisons for the imprisonment of soldiers who are not to be employed, and the only employment being what is termed "hard labour," the late Duke of Wellington, when commander in chief, recommended (6) courts martial to refrain from awarding simple "imprisonment" to prisoners proposed to be committed to such prisons, and confine their awards to "imprisonment with hard labour" or to "solitary confinement" or to a combination of these two punishments. The regulations now direct that where the certificate of the medical officer "states that the prisoner is unable to undergo hard labour, the courts may nevertheless award '*imprisonment with such labour as, in the opinion of the medical officer of the prison, the prisoner may be equal to.*'" (7)

685. The Queen's Regulations point out that "The duration of imprisonment for all ordinary offences is not to exceed six months, for offences of a more aggravated character, imprisonment may, under the provisions of the articles of war, be awarded by court martial to the extent of, but not exceeding, two years. In awarding sentences of imprisonment, the locality and climate in which the offender has to suffer is however to be kept in view. It is also the

(5) Extract. — Letter dated 29th August, 1844, to a major general commanding a district in Ireland. A district court martial had sentenced a soldier to solitary confinement in the terms of the mutiny act, and was re-assembled and directed to revise its proceedings, as it appeared by the record of former convictions on the face of the proceedings that the prisoner had already undergone three months' solitary confinement within the year, the major general adding "by the mutiny act, a soldier can only be kept in solitary confinement, eighty-four days, which he has undergone already."

The judge advocate general "ventured to differ as to the construction to be put on the clause of the mutiny

act," and pointed out that the sentence being legal the proper course, as it appeared to him, was for the major general,—if he was of opinion that the solitary confinement, or any part of it, ought not to be inflicted,—not to order a revision, but to remit the solitary confinement in whole or in part.

A copy of this letter was placed before district courts martial, subsequently held in the command, for their information and guidance.

(6) Circ. Mem., 13th August, 1845.

(7) Q.R.App.A., p.12. It is understood that there are various descriptions of light labour to which prisoners may be subjected in the military prisons without injury to their health.

province of the general officer confirming the sentence to take these circumstances into consideration, with a view to diminish, if necessary, the period of imprisonment." (8) The sentence is always to be specified in days, (9) even when for an exact multiple of months.

686. The mutiny act having given authority to superior and commanding officers to appoint the "place of imprisonment, (10) the court are not to notice it in their sentence; nor,—except in those cases where they may pass a sentence of imprisonment on an offender, already under sentence of imprisonment, to commence at the expiration of the imprisonment to which such offender shall have been previously sentenced, (11)—are they to award imprisonment commencing at any specified time, the articles of war providing that every term of imprisonment under the sentence of a court martial, whether original or revised, shall be reckoned as commencing on the day on which the original proceedings and sentence shall have been signed by the president. (1)

Courts martial have no power to fix place of imprisonment,

or time of its commencement, except in case of offenders imprisoned under a previous sentence.

687. Two punishments, distinctly and essentially differing in their nature, cannot be awarded but by express authority to that effect in the mutiny act or articles of war. A court martial cannot therefore award corporal punishment and penal servitude, imprisonment and penal servitude, for the same offence; nor can a regimental court martial award corporal punishment and imprisonment; (2) but a court martial may, in every case left discretionary, sentence an officer to loss of rank and to be reprimanded; and, in like manner, non-commissioned officers are reduced to the ranks, if sentenced to undergo imprisonment or other punishment to which the present practice of the army forbids that a non-

Cumulative punishments may in certain cases be awarded for the same offence;

non-commissioned officers, reduction of;

(8) Q.R.App.A.p.21.

(9) Q.R.App.A.p.13. The 188th article provides, that in construing the articles the word "year" shall mean "calendar year," and the word "month" "lunar month" (twenty-eight days). This is directly opposed to the sense in which "month" is to be understood in acts of parliament, as by 13 & 14 Vict. c. 21, s. 4 the word "month" is deemed and taken "to mean calendar month, unless words are added showing lunar month to be intended."

(10) M.A.30.

(11) M.A.28.A.W.138. "When courts martial avail themselves of the power

vested in them by the mutiny act regarding the imprisonment of offenders already under sentence for previous offences, they should be careful to adhere to the provisions of the said act, by awarding in express terms that "*the imprisonment is to commence at the expiration of the punishment to which the prisoner had been previously sentenced.*"—Q.R.App.A.p.15. See § 648.

(1) A.W.139.

(2) General and district or garrison courts martial were authorized to award imprisonment, in addition to corporal punishment, in the year 1847. See § 674.

prescribed
form of
sentence.

commissioned officer, as such, should be subjected. When a non-commissioned officer is sentenced to be reduced, it must be distinctly stated in the sentence that he is to be "reduced to the ranks" (*i. e.* to a gunner, driver, sapper, or private). The sentence of reduction of artificers, having the rank of a non-commissioned officer, is to be awarded in the same terms, *i. e.* "to the ranks," and not to shoeing smiths, &c. (3)

Acting non-
commissioned
officers not to
be awarded
reduction.

688. An acting bombardier or lance corporal is arraigned as gunner, driver, sapper, or private, as the case may be, with a specification of his acting rank; [§ 387] but "the loss of acting or lance rank is not to form part of the sentence of the court." (3)

Sentence
of stoppage
of pay

689. The hundred and thirtieth article specifies the cases in which an offender may be placed under stoppages until he has made good any money or articles wrongly issued to him, medals or decorations "made away with or pawned" (not lost), or any loss, destruction, damage, injury, or expense which may have been proved against him. The hundred and thirty-first article very distinctly points out the manner in which the sentence is to be framed. In the case of arms, clothing, instruments, equipments, accoutrements or regimental necessities, the court is by its sentence to direct that the stoppages shall continue till the cost of replacing the same be made good. In the case of any other loss, destruction, damage, or expense, as for example in the case of barrack sheets, rugs, and blankets, which are not "necessaries," the offender is to be placed under stoppages to such an amount only as has been ascertained by evidence and proved to the satisfaction of the court, and distinctly specified by them in their sentence. (4)

to replace
arms, &c.;

to make good
damage, &c.,
the amount of
which having
been ascertained
by the court,
must be
specified in
the sentence.

Sentence to
make good loss
and damage
incurred by
embezzlement.

690. It must also be borne in mind, that whenever an offender has been convicted of any offence in breach of the eightieth article, the court must be careful, as therein laid down, in framing their sentence, to follow the provisions of the seventeenth section of the mutiny act.

691. As they have been already particularised, §117-140,

(3) Q.R.App.A.p.19.

(4) A Circular Memorandum, of the 9th May, 1851, called the attention of courts martial to the corresponding provisions in the mutiny act

and articles of war of that year, "courts martial having in several instances adhered to obsolete and irregular forms of framing sentences of stoppages of pay."

there does not appear to be any occasion to recapitulate the remaining punishments which courts martial may award.

692. When the sentence of the court is entered on the proceedings, [§484] they are signed by the president, who is responsible that the day and place of his signature are duly specified in every case. The judge advocate adds his signature to the proceedings of general courts martial below and to the left hand of the signature of the president.

The president dates and signs the proceedings and sentence,

693. A certificate, in the handwriting of the medical officer, according to the prescribed form is to be attached to the proceedings. (5)

attaches a medical certificate.

694. When it appears to the satisfaction of the court making enquiry in the case of a prisoner of war, being a soldier and rejoining the service, that there was no wilful neglect of duty on his part, the court may recommend that he receive the whole or a part of his arrears of pay, and reckon service during his absence. (6)

Recommendation on trial of returned prisoner of war.

695. The proceedings of general courts martial held at home are transmitted by the officiating judge advocate to the judge advocate general, for the decision of the Sovereign, (7) accompanied by a covering letter specifying the nature of the contents. (8) Abroad they are in like manner forwarded to the confirming authority. (7) The proceedings of district or garrison courts martial are transmitted by the president to the confirming authority direct, or to the army head quarters, where there is no general officer in command. (9) The proceedings of regimental courts martial are laid before the commanding officer, by the president; [§315] and those of a detachment court martial in like manner before the senior officer on the spot.

Proceedings of general courts martial forwarded for approval by the judge advocate,

and by the president of other courts.

696. When there are no more prisoners to be tried, and the officer, by whose orders the court was assembled, is not also the confirming authority, the president reports that the proceedings are closed, and the court adjourns [§525] until further orders.

The president reports the close of the proceedings.

697. It is the duty of the court in passing judgment to mark their sense of the crime as found apart from particular

RECOMMENDATION TO MERCY.

(5) Q.R.S.6,p.61.

(6) A.W.171, M.A.50,§124.

(7) Q.R.App.A,p.22.

(8) Q.R.App.A,p.25.

(9) Q.R.App.A,p.23.

RECOMMEN-
DATION TO
MERCY,

in what cir-
cumstances
made by court ;

to be embodied
in a separate
letter, and
forwarded with
the proceedings,

but should not
suggest any
particular
exercise of
clemency.

REMARKS BY
COURT.

extenuating circumstances ; but it is open to them to add a recommendation in favour of the prisoner. His Royal Highness the Duke of Cambridge, when remarking upon the observations of the commander in chief in India in his rejection of the recommendation of the court in favour of Captain Jervis, in terms of emphatic approval pointed out the practice of courts martial, namely that where there were “ circumstances which might be considered in extenuation, the court, whether regimental, district, or general, would award a sentence commensurate with the offence, accompanying it with such recommendation to mercy as would lead to a mitigation or remission of the punishment.” (1)

698. An “ instruction ” in the regulations of 1868 fixed the course which the court is to pursue when they desire to recommend the prisoner to favourable, or merciful, consideration. “ They are to embody their views in a separate letter, to be signed by the president, and forwarded with the proceedings to the confirming authority, or to the judge advocate general, as the case may be.” (2) The reasons for recommending the prisoner should be distinctly set forth ; but the court should carefully avoid to point out “ any particular mode in which the prisoner may be deemed worthy the royal clemency.” (3)

699. Where circumstances appear to call for remark, courts martial do not confine themselves to the mere record of their finding and sentence, and an action is not maintainable against the president or other members for this exercise of their judicial functions, where the words of the remarks would otherwise constitute a cause of action. This appears from the case of *Jekyll v. Sir John Moore* (4), and the remarks of the chief baron (Sir Fitzroy Kelly) in giving judgment in a recent case, (5) in which the other judges

(1) Despatch to commander in chief in India, Horse Guards, 17th January, 1867.—Para. 30.

(2) Q.R. App. B(12).

(3) G.O.303

(4) A general court martial held on the 25th June, 1804, most honourably acquitted Col. Stewart, of the 43rd Regiment ; and in their remarks characterized the conduct of the prosecutor, Captain Nathaniel Jekyll, of the same corps, as malicious in endeavouring falsely to calumniate the character of

his commanding officer. The King, causing it to be intimated to Captain Jekyll that he had no further occasion for his services, he brought an action against the President (Sir John Moore) in the Court of Common Pleas, but the court held that the words complained of were a part of the judgment of the court, and that no action could be maintained upon them. G.O.7th July, 1804. *Jekyll v. Moore*, 2 New Reports, C. P.341.

(5) *Scott v. Stansfield*. This was

concurred, are here given, as they bear directly on the point. He laid down the general proposition, "that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice," and added:—"This doctrine has been applied not only to the superior courts, but to the court of a coroner, and a court martial, which is not a court of record. It is essential to all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (6)

Remarks privileged for reason of public benefit.

700. Until the issue of the Queen's regulations in 1868, the "remarks by the court" had been appended to the sentence, after the signature of the president. A change was then introduced, but without any intimation of the improvement contemplated by it. The instruction already quoted, §698, with reference to recommendations to mercy also directs, that when "the court desire to remark on the conduct of the parties before them, or on the manner in which a particular witness has delivered his testimony, &c., &c." they are to embody their views in a separate letter as there directed.

Embodied in separate letter.

701. Courts martial have sometimes, in acquitting a prisoner, entered at some length into the motives of such acquittal, (7) or given an opinion generally of the conduct of the accused. (8) They also remark on the conduct of a prosecutor, as connected with the charges, or in the course of the prosecution. (9) In the case of Lieutenant Colonel Keating, the court martial animadverted on the personal ill-will and animosity of the prosecutor, Captain Frye, and the

Motive of acquittal and opinion of prisoner.

Court may remark on the conduct of prosecutor in respect to the charges.

Case of Lieut. Colonel Keating.

an action for slander, and judgment was given on the 8th June, 1868. The defendant was a county court judge, and pleaded that the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the present plaintiff was defendant. It was replied that the words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable

cause, and without any foundation whatever, and not *bona fide* in discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him:—*held* that the replication was bad, and the action not maintainable. See further, §1356.

(6) Law Reports, 3 Exchequer, 223.

(7) G.O.236.

(8) G.O.396.

(9) G.O.379, 423, 482.

Court may remark on the conduct of prosecutor in respect to other charges.

frivolous and vexatious nature of the charges; the general officer who confirmed the sentence characterized the remarks of the court as "judicious and appropriate:" and it was made known by a general order, dated 14th February, 1809, that—"His Majesty considers that the finding and sentence of the court, as approved and confirmed by Major General Jones, were fully warranted by the circumstances which appeared upon the trial, and are strictly conformable to the justice of the case. His Majesty has been pleased to notice and confirm in a more especial manner, the appropriate censure passed by the court martial upon the motives which fully appear on the face of the proceedings to have marked the conduct of the prosecutor." (1)

In respect to conduct disclosed by the evidence.

Case of Captain Wathen.

702. Courts martial have sometimes remarked in very strong terms of disapprobation on conduct of the prosecutor as prejudicial to discipline, which has appeared on their minutes. Captain Wathen, 15th Hussars, was tried on six charges, preferred at the instance of his commanding officer, Lieut. Colonel Lord Brudenell, and honourably acquitted of *each and all* the charges; and the court remarked: "Bearing in mind the whole process and tendency of this trial, the court cannot refrain from animadverting on the peculiar and extraordinary measures which have been resorted to by the prosecutor. Whatever may have been his motives for instituting charges of so serious a nature against Captain Wathen (and they cannot ascribe them *solely* to a wish to uphold the honour and interests of the army), his conduct has been reprehensible in advancing such various and weighty assertions to be submitted before a public tribunal, without some sure grounds of establishing the facts. It appears in the recorded minutes of these proceedings, that a junior officer was listened to, and non-commissioned officers and soldiers examined with the view of finding out from them, how in particular instances the officers had executed their respective duties; a practice in every respect most dangerous to the discipline and the subordination of the corps, and highly detrimental to that harmony and good feeling which ought to exist between officers. Another practice has been introduced into the 15th Hussars, which calls imperatively for the notice and animadversion of the court,—the system of having the conversa-

(1) G.O.180.

tions of officers taken down in the orderly room without their knowledge, a practice which cannot be considered otherwise than revolting to every proper and honourable feeling of a gentleman, and as being certain to create disunion and to be most injurious to His Majesty's service." His Majesty was pleased to approve and confirm the finding of the court. The general order proceeded: "Although it would appear, upon an attentive perusal of the whole of the proceedings, that some parts of the evidence might reasonably bear a construction less unfavourable to the prosecutor than that which the court have thought it their duty to place upon them, yet, upon a full consideration of all the circumstances of the case, His Majesty has been pleased to order that Lieut. Colonel Lord Brudenell shall be removed from the command of the 15th Hussars." (2)

703. Courts martial have sometimes declared charges frivolous, vexatious, and groundless, (3) and sometimes malicious, (4) and not originating in a desire to promote the good of the service, (5) but proceeding from warmth of temper and ignorance, (6) insubordination, animosity, resentment, revenge, or conspiracy. (7)

Court may
animadvert on
charges and
their origin,

704. Courts martial may also, in acquitting a prisoner, animadvert on the tone of his defence, or on any violence of language in respect to the character of a witness. (1) So, also, courts martial have frequently declared that, in their opinion, the prosecutor was actuated by no illiberal or improper motive, (2) but a sense of duty and regard for the benefit of the service, (3) or that his conduct has been laudable and honourable, (4) or regular and impartial: (5) such remarks by the court have generally been produced by strong assertions or insinuations of the prisoner, not supported by evidence, and have occasionally accompanied an acquittal, at other times a conviction.

or on intemperate defence
of prisoner,

and impartial
conduct of
prosecutor.

(2) G.O. 529.
(3) G.O. 196.
(4) G.O. 209.
(5) G.O. 292.
(6) G.O. 238.
(7) G.O. 236 and 291.
(1) G.O. 8th Nov. 1845. "The Court having acquitted the prisoner, Lieutenant William Augustine Hyder, of the 10th Royal Hussars, of the charge preferred against him, cannot

refrain from animadverting in the strongest terms of disapprobation on the violent, coarse, and uncalled-for language which he, the prisoner, has had recourse to in his defence, in allusion to the character of Silvester Olliver, Esq."

(2) G.O. 243.
(3) G.O. 250.
(4) G.O. 397.
(5) G.O. 296.

Court may
remark on
witnesses.

705. Courts martial occasionally animadvert on the conduct of witnesses; and that they are justified in doing so, appears from many general orders promulgating sentences. On the trial of Captain Theobald O'Doherty, of the 91st Regiment, in January 1825, "His Majesty was pleased to command, that in consequence of the serious animadversions passed by the court upon the conduct of Captain Richardson, and Brevet Major Creighton, of the 91st Regiment, which animadversions appear to be amply borne out by the minutes of their evidence upon the trial of Captain O'Doherty, these officers shall be required to send in their resignations, with a view to their retiring from His Majesty's service, by the sale of their respective commissions." (6) They have sometimes observed, in terms expressly charging perjury, (7) or falsehood, (8) on the mode in which witnesses have delivered their testimony; sometimes they have implied censure, (9) at others praise. (1)

On causes lead-
ing to the trial,

706. Courts martial have also animadverted on the causes which have led to the trial, implicating the conduct of persons not before the court; (2) and that although they may not be amenable to military law. (3) They also occasionally observe on any irregularity to the prejudice of discipline, committed by persons not before the court, but connected incidentally with the subject of trial. (4) The duty of the court in respect to censure upon persons not before the court is one of a very delicate nature. It ought only to be resorted to in extreme and special cases, which admit of no possible explanation, as it seems opposed to the most obvious principles of justice, that any man should be censured unheard, unless indeed he withdraw from enquiry, or purposely keep out of the way in order to withhold evidence which it may be in his power to afford.

and on points
connected with
discipline,
affecting persons
not before
the court.

Courts martial
the more bound
to caution,
because not
amenable to
civil courts.

707. It is all the more incumbent upon the members of courts martial to be thus guarded in respect to the remarks of the court, because—"however false or injurious to the character or interests of a complainant"—they "are absolutely privileged, and cannot be inquired into in an action at law for defamation." (5)

(6) G.O.489.

(7) G.O.320.

(8) G.O.259 and 286.

(9) G.O.451, 483, 506, 533.

(1) G.O.243.

(2) G.O.447 and 465.

(3) G.O.447.

(4) G.O.447, 450, 465.

(5) See judgment of the Court of Exchequer Chamber, §1363; and Scott v. Stansfield, § 699.

708. It is incumbent on a court, that its animadversions, affecting witnesses or third parties of any description, should be in definite and not in general terms. In the case of Ensign Stanton of the 8th Foot, the court had noticed "the unjustifiable conduct of Assistant Surgeon Brown, in regard to the prisoner, as it appeared in evidence." "His Majesty expressed much regret that he (the assistant surgeon) should in any instance have subjected himself to the severe censure which the general observation conveys; but His Majesty at the same time remarked, that the court martial, impressed with such sense of his conduct, ought to have specified in direct terms, and in a manner which might have been acted upon, those parts of the assistant surgeon's behaviour which drew from them so pointed an animadversion." (6)

Animadversions
not to be
general;

case arising on
the trial of
Ensign Stanton.

(6) G.O. Horse Guards, 28th Sept. 1805.

CHAPTER XVII.

DECISION UPON SENTENCE.

Sentences of courts martial do not take effect, and are not divulged until confirmed.

709. THE sentences of military courts martial, unlike the sentences of courts of ordinary criminal jurisdiction, are inoperative until the directions of the Queen or of the confirming officer have been signified thereon; (1) and the oath of the members [§440] provides that they shall not be divulged until they are duly approved.

The confirming authority.

710. The confirming authority varies according to the description of court, the place where, and the purposes for which it was assembled. The sovereign confirms the sentences of general courts martial, or authorizes officers in command thereto empowered under the sign manual, or by warrant in pursuance of authority under the sign manual, to confirm them according to the terms of their warrant. (2)

General courts martial.

At home.

711. The warrants to general or other officers commanding in the United Kingdom and the British Isles do not authorize them in any case to confirm the sentences of general courts martial convened by them. Those to officers in command *abroad*, except in India, empower them to cause sentences, passed by such courts, to be put into execution, or to suspend, mitigate, remit, or commute the same, except in

The confirming officer abroad to convey a power to execute, mitigate, or remit any sentence,

(1) A.W.123. Before, and for some years after the revolution of 1688, confirmation by superior authority was not necessary. The court, having finished its deliberation, the prisoner was brought in, and sentence was pronounced in the name of the court martial. This custom still obtains on naval courts martial; and, for some reasons, it is to be regretted that it should have been superseded in the army, especially where the prisoner is acquitted of the whole of the charges preferred against him.

In the articles of Queen Anne it was provided, that "no sentence shall be pronounced, until report of the whole

matter by the president;" but, in 1691, the 73rd article still prescribed "when ever any sentence of death is given out in the court martial, it shall be read by the register of the court in the presence of the condemned, and signed by the president; thereafter it shall be given to the general or other chief officer, who may notwithstanding suspend the same, until he shall acquaint us, or see it put in execution when he shall see fit."

(2) A.W.123, M.A.6. See forms of warrant in Appendix. As to the confirming officer of other courts martial, see §284, 299, 305, 315, 322.

the case of commissioned officers, sentenced to suffer death or penal servitude, or to be cashiered, or dismissed, in which case, as in the case of any other general courts martial in which they shall think fit to do so, the proceedings of the court are reserved for Her Majesty's decision thereon. (3) In India the commander-in-chief may, in like manner, transmit any general court martial, if he think fit, for Her Majesty's decision; but he is authorized to carry into execution the sentences of courts martial, without any exception, (4) and the cases of officers sentenced to death, penal servitude, cashiering, or dismissal, as any other cases reserved by them, are referred to him, by the generals commanding the several presidencies, as to the Queen from other foreign stations, to act in respect to them as he shall think fit. (5)

except in cases of commissioned officers cashiered or sentenced to death, when the proceedings are submitted to Her Majesty, or in India to the commander in chief;

712. A limitation to the power given to the officers, in command on foreign stations, to execute the sentence of courts martial, arises from the hundred and twenty-third article of war, which provides that no sentence of death shall be carried into effect in any of the Queen's colonial possessions (and this holds good in India) until it has been approved in Her Majesty's behalf by the civil governor or person administering the civil government. In all other cases the sentence of courts martial is carried into execution without the previous sanction of the governor general or other civil governor or person administering the government. (6)

and except that where there is a civil governor, capital punishment cannot be executed till approved by him.

713. The hundred and first section of the mutiny act, which regulates the trial of civil offences by courts martial in India, provides that in every case of a sentence of death or penal servitude being awarded to a commissioned officer, or a sentence of death being awarded any person other than

The concurrence of the governor general, &c., in India, when necessary in sentences for civil offences.

(3) Warrant, Appendix II. As to schoolmasters, see § 66n.

(4) See Warrant—Appendix, III. This unlimited power in the case of officers was for the first time inserted in the warrants issued to the Marquis Hastings, governor general and commander in chief in 1813. A similar warrant was issued to the general or officer commanding in chief in China in the year 1858, when our troops were acting with the French.

The first instance of the like full powers being given to a British commander of the forces, since the Duke of

Marlborough, was when the allied army proceeded to the East. It was thought desirable to assimilate Lord Raglan's powers as much as possible to those of the French commander in chief, and the clause excepting sentences of death, penal servitude, cashiering, dismissal, or discharge upon officers was omitted in the warrant for holding general courts martial, which was then issued to him "or the officer commanding the forces."

(5) See Warrant—Appendix, IV.

(6) A.W.123. Q.R.S.2,p.20. C.R.15. See § 780n.

a commissioned officer, the governor general in council, or governor in council of the presidency shall approve such sentence, before it can be carried into execution.

In cases of capital sentences for civil offences,

714. In the hundred and forty-third article, which provides for the trial of treason or other civil offences, by courts martial in places within the Queen's dominions beyond the seas (excepting India) where there is no competent civil judicature, there is the following clause: "We hereby reserve to ourselves the power, in all cases where a sentence of death shall have been pronounced on any officer or soldier by any general court martial as aforesaid, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude, or to be imprisoned, with or without hard labour, for such period of time, as on consideration of all the circumstances of the case, shall seem to us to be most just and fitting." When the clause to this effect was added to the articles in the year 1833, no official explanation of its intention was afforded, and it gave rise to much discussion. It seemed that the clause, if taken in its most obvious sense, and without referring to other provisions by which it must be construed, would have the effect of prohibiting the infliction of capital punishment awarded a soldier under the article, unless approved by the sovereign.

the reservation of the article

does not apply except as explained by the provisions of the warrant,

715. On the other hand, the warrants under the sign manual issued to commanders of the forces abroad, in pursuance of the provisions of the articles of war, have continued without any such reservation, to authorize the execution of sentences of courts martial at their discretion, except upon officers adjudged to suffer death, or cashiering, or in other instances wherein they may think it proper to suspend them. Acting upon them, and subject to the approval, in Her Majesty's behalf, by the civil governor, general officers have carried capital sentences under this article into execution without their proceedings being called in question.

and hence it follows that the commander of the forces may carry them into immediate execution.

716. There can be no doubt, therefore, that the intention of the clause is this—that Her Majesty "*reserves to herself*,"—not the *decision* in every case of a sentence of death, but,—"*the power*" of commuting the capital punishment in all cases which may come before her; specially providing that the proceedings *shall* be laid before her in the case of officers and authorizing the suspension of the sentence in

any other instance at the discretion of the commander of the forces.

717. The proceedings of all general courts martial at home, and those already mentioned, [§711] as reserved in the terms of their warrant by officers commanding the forces abroad, as well as those which they may think proper to refer for the Queen's decision, are transmitted to the judge advocate general. Until the year 1806 the decisions of the sovereign were received and communicated by him, but in that year another system was adopted, as embodied in a communication of His Majesty's pleasure from the secretary at war to the judge advocate general, from which the following is an extract :—"The judge advocate general lays the proceedings of courts martial before His Majesty, and afterwards transmits them to the commander in chief, or in his absence to the adjutant general, together with a memorandum in writing of the opinion delivered to His Majesty on each sentence, with any observations that may be thought necessary on any part of the proceedings, in order that His Majesty's pleasure may be received thereon. The commander in chief or adjutant general having received His Majesty's pleasure, communicates the same to the general or commanding officer by whose order the court martial was assembled, and returns the proceedings to the judge advocate general, together with a copy of the letter by which His Majesty's pleasure on each sentence or any part of the proceedings has been communicated." (7)

The judge advocate general received and communicated the decision of the sovereign,

until the existing routine was established,

718. The system then established has been continued to the present time, the judge advocate general, or when occasion requires, the deputy judge advocate general submitting the proceedings to the Queen, at a personal audience, with his advice as to their legal bearing, and the commander in chief investigating the case in reference to its

the judge advocate general now advising the Queen as to the legal,

and the commander in chief

(7) Signed, Richard FitzGerald. War Office, 6th August, 1806. This alteration in the mode of receiving and communicating the King's decisions upon the proceedings of general courts martial was made known by a war office circular, 22nd August, 1806 (*War Office Regulations*, 1806, page 561), and a corresponding form of the annual warrants was altered in this respect to that still retained. [§ 1251] A regula-

tion had been made on the 27th May, 1806, that the commander in chief, or the adjutant general, should receive the proceedings and submit them to the king; but it was rescinded on the 6th August, as above, the judge advocate general having meanwhile (in June) requested permission to resign his appointment, from dissatisfaction, it was understood, at the alteration.

as to the military bearing of each case.

In cases of acquittal the Queen dispenses with a personal audience

in order to avoid delay.

The commander in chief gives effect to the Queen's decision.

Determination of a confirming officer written at end of proceedings; but inadvertent minute of confirmation may be rewritten if not promulgated

REVISION,

may be once ordered.

Reasons for revision in every case embodied in proceedings.

disciplinary aspect, and laying his recommendation before the Queen as to the remission or otherwise of the whole or any part of the sentence.

719. A modification in the established routine was however introduced in 1866, in cases where the judge advocate general is satisfied as to the propriety of an acquittal. Instead of awaiting the royal command for a personal audience, he forthwith despatches the proceedings to Her Majesty in a box, with a précis, at the same time informing the commander in chief that he has done so; and when he receives Her Majesty's approval, he at once communicates it to the commander in chief, so that there may be no delay.

720. In all cases the commander in chief signs the letters necessary to give effect to Her Majesty's decision, which letters are prepared under his direction by the military secretary. (8) Confirming officers are required to state, at the end of the proceedings, "the manner in which the case is disposed of." (9) The confirming authority, at any time before promulgation, may obliterate and treat as a nullity a minute of confirmation made under a misapprehension of the law [or the facts], and order a revision, (1) or rewrite the minute on reconsideration.

721. If however the proceedings are not approved, the authority by which a court martial may be confirmed is competent to order a revision; but it is provided by the fourteenth section of the mutiny act that no finding, opinion, or sentence, given by any court martial, and signed by the president, shall be revised more than once. Before 1750, when this limitation was inserted, the sentence might have been returned for revision any number of times.

722. The sovereign's commands for a revision are communicated by letter. The reasons of confirming officers are occasionally written at the end of the original proceedings. A practice which previously existed, is enforced by the

(8) This business has for many years been dealt with in the office of the military secretary. Lord Northbrooke's committee (*Third Report*, 12th Feb. 1870, page xiv.) recommended that the proceedings should go to the adjutant general.

(9) Q.R.App.B(10). This was the established custom before the insertion of the order in the regulations.

Colonel Robertson, 8th Foot, was tried, and found guilty, amongst other charges, of "permitting sentences of regimental courts martial to be carried into execution, without affixing his approval to the proceedings of the same." G.O.450. 15th September, 1810. As to the manner in which the proceedings may be dealt with, see §730, &c.

(1) J.A.G. 22nd April, 1873.

Queen's regulations which direct whenever a court martial is reassembled for the purpose of revising its proceedings, the letter, order, or memorandum, or a copy thereof, containing the instructions to the court, and the reasons for requiring the revision, is to be attached to and form part of the proceedings. (2) It is however held, that at any time before the court has proceeded to a final finding or sentence, the confirming authority may revoke the order for revision, and either substitute another, or confirm the original finding and sentence.

Minute for revision may be reconsidered and recalled.

723. The proceedings of the court martial are returned to the officiating judge advocate (or to the president of minor courts martial), either direct, or through the officer, by whose order the court may have been convened, and the court reassembles according to a notification in orders; or, sometimes by a circular from the officiating judge advocate. In the event of the absence of any member, except in consequence of his death, illness, having been taken prisoner of war, or being no longer in the service, the court cannot proceed to a revision, even though the legal minimum or a larger number be present.

Orders for reassembly of court, how promulgated.

Proceedings cannot take place in the absence of a member.

724. The mutiny act of 1830 declared that *no witness* shall be examined, or *additional evidence* received by a court martial on revision. (3) The words "in respect to any charge on which the prisoner then stands arraigned" were added in 1860, and authorize the reception, on revision, of evidence as to previous convictions. The provisions of the mutiny act respecting additional evidence refer only to such evidence as tends to prove or disprove the offence set forth in the charge.

No witness examined with reference to the finding of the court.

725. Where a court martial decided not to hear certain statements in defence, and not to admit the reading of parts of a printed book, "which the prisoner insisted upon his legal

Court revised, prisoner having been unduly restricted in defence,

(2) Circ. Mem., 12th December, 1844. Q.R. A.16.

(3) M.A. 14. Before the first alteration of this clause in 1830, courts martial, on revision, never, with propriety, received evidence or examined *fresh* witnesses: but particular questions had been *put by the court* to a witness *previously* examined, with a view to clear up any doubt which might be suggested to exist as to the import of the testimony recorded and

to this extent only, that is, as it may bear on the questions thus put, was the party interested permitted to re-examine. But much difficulty often arose from this guarded re-examination of witnesses on revision; and its entire prohibition was, therefore, considered a judicious innovation. An incidental advantage is the immediate and certain release of the witnesses, on the adjournment of the court for approval.

right to urge as a justification against the charges," such statements and extracts, not being otherwise than "decent and proper;" and where the prisoner has, in consequence, withdrawn his address, and declined to make any defence (at the same time protesting against the decision of the court, and subsequently submitting the point to the judge advocate general, the general officer in command having declined to interfere upon the question), a revision was ordered, upon the express grounds that the trial had "*not been regular, and that the sentence of the court could not be sustained.*"

Matter expunged
by court,
ordered to be
admitted.

The rejected document was directed to be admitted and inserted, and the prisoner's defence to be heard throughout; the judge advocate general remarking, that "the decision of the court, 'that the prisoner was at liberty to *refer* to the chapter and verse of any book, but not to *read* extracts from religious works,' would seem to be arbitrary, and inconsistent with itself; for when matter is admitted, by permission to refer to it, to be pertinent, it is of the essence of any defence, that the party should be permitted also to explain the application of such matter to his own particular case." (4) For similar reasons, a revision has been ordered where the court had directed certain parts of a prisoner's address, "containing religious matter, to be expunged, as being quite foreign to the charge," the prisoner protesting against the act of the court by observing, "that he should reserve to himself the liberty of referring to higher authority," but proceeding with his defence. (5) In both of the cases referred to the prisoners merely read their defence and did not attempt to produce evidence on revision, though no law *then* existed to prevent it. These cases tend to show the importance of the due admission or rejection of a prisoner's address, and much more of legal evidence; if *the sentence could not be sustained*, because a prisoner was improperly restricted in his address, much more would the rejection of legal evidence render it unwarranted and inoperative. (6)

Matter previously
recorded
cannot be
expunged :

726. A court martial, on revision, cannot *alter* or obliterate any part of the previous proceedings, or expunge from the record any testimony, however illegally it may have

(4) J.A.G., 31st May, 1824.—*Trial of Lieut. Dawson*, p. 83. the opinion of the twelve judges as to his *unwarranted* conviction.

(5) Trial of Captain Atchison, p. 16. [§919n]

(6) See the case of Muspratt, and

been admitted. Its duty in such case, as the word *revise* indicates, is to review and reconsider its judgment, opinion and sentence; which may obviously require a reconsideration and weighing of the recorded testimony, with a view to correct, by an insertion of a second opinion, any error in the sentence which may have arisen from inadvertence, or from misconception of law or of the customs of the service.

summary of
duty of court
on revision.

727. Where a court martial had received evidence as to previous convictions, subsequent to the defence, but prior to the finding of guilt, it has been ruled that, as there did "not appear any irregularity till after the defence," a revision might be ordered, and the court enjoined "to dismiss from their consideration any part of the evidence admitted subsequent to the defence; thereupon deliberating upon the guilt or innocence of the prisoner, and passing sentence accordingly." It was also observed, on the same case, that the inadvertent approval of the sentence, under such circumstances, *would have* rendered the proceedings altogether invalid. (7)

Revision on
account of
evidence irregu-
larly received.

728. An illegality as to the constitution of the court, or a defect in its composition, cannot be amended on revision; much less can an illegality as to the charge be remedied. (8) Such flaws must obviously invalidate the proceedings to such a degree as to render the sentence innoxious to the prisoner, as must any illegal assumption of jurisdiction over crime or person; but it does not follow that every such capital error must *necessarily* so entirely annihilate the trial as to expose the prisoner to trial by another court martial. The statute enacts that no officer or soldier, *being acquitted, or convicted* of any offence, shall be liable to be tried a second time, by the *same or any other* court martial, for the same offence. (9) A court which has exceeded its jurisdiction may still, in itself, be a legal court, though not legally competent to

Illegality in
the composition
or constitution
of courts
martial not
to be amended
on revision,
nor illegality
in charge,

but must in-
validate the
sentence.

An offence tried
by a legal court,
offender cannot
be again tried,

(7) Judge advocate general as to district court martial on Private Rush-ton, 95th Regiment.

(8) On a reference to the judge advocate general, he replied, "I entirely concur with Major General Ross in thinking the charge so absolutely defective in all legal respects, that it was impossible to confirm a finding of

guilty thereupon. I need not add, that I consider any revision out of the question, as no sentence of punishment could be properly adjudged or enforced upon a charge not supportable in law."—*Sir J. Beckett to the Judge Advocate on a District Court Martial, 18th March, 1830.*

(9) M.A.14.

but the prisoner is relieved from all consequences of the trial.

entertain a particular charge, or any charge against a prisoner of privileged rank, for whose trial a court of a special composition is enjoined, as in the case of a field officer. But when a trial has by inadvertence illegally taken place before such *intrinsically* legal court, and an acquittal or conviction has been once recorded, the statutory provision above quoted must preclude any further trial. If indeed the court were itself illegally constituted, as for instance, if it were convened by an officer who had not received a warrant, if an oath, other than that prescribed, had been used, or the appointed oath had been omitted, if it consisted of less than the minimum number of members, then, indeed, it would be no court at all; and, therefore, whatever opinion any number of officers, so assembling otherwise than as required by the law, might be pleased to express in writing, it could not be termed the acquittal or conviction of an officer or soldier by a court martial: their acts would be mere nullities.—It must be evident, without further remark, that the illegal act of a legal court, and the act of an assembly of officers constituting no court whatever are essentially and wholly different, (1)

Prescribed form of minute of revision.

When modified, the former act of the court must be expressly revoked.

729. When the finding and sentence, or both finding and sentence, are modified by the court upon revision, the court is required in every instance to “revoke their former act or acts, which are to be modified, whether finding only, or sentence only, or sentence and finding, and then to proceed to state in complete form their final finding or sentence, or finding and sentence.” (2) If the court on revision adhere

(1) The author, in the second edition of this work, was enabled to refer in support of the construction which he has placed on the mutiny act, to the following opinion, given in December, 1828, by Sir J. Beckett, when judge advocate general: “The circumstance of Ensign Brown (whose property the prisoner is accused with an attempt to steal), sitting as a member of the court, appears to me to be more open to observation; indeed, I think it so objectionable that I acquiesce in the propriety of the punishment awarded by the court being remitted in this case, and as the prisoner cannot legally be brought to trial a second time upon the same charge, I would suggest that the prisoner be ordered to his duty forthwith.” Subsequently the same prin-

ciple was acted upon in the following singular case. An officer belonging to the Queen’s regiment in India was brought to trial and sentenced to be cashiered, but it appearing that the court, although convened by competent authority and otherwise regular in its proceedings, was wholly composed of officers in the then Company’s service, which was not legal under the existing mutiny act, the sentence was not carried into effect, and the prisoner was released from his arrest and returned to his duty.

See also Q.R.S.6.p.62, and §731.

(2) Circular. Horse Guards, 29th Dec. 1866. The prescribed forms are now inserted in the regulations.—Q.R. Appendix, B(11).

to their former judgment, the fact is stated in the established form; that they "do now respectfully adhere to their former sentence," or "finding and sentence," as the case may be. (3) The court having finally closed, the proceedings are returned to the confirming authority, and are then dealt with in the same manner as original proceedings which have not been revised.

730. The proceedings of courts martial, [§720] whether original or revised, (4) may be

Sentence may be confirmed

I. *Confirmed*, or where part of the sentence is illegal, and the proceedings have been once revised, or the confirming authority does not think it necessary, or is unable, to re-assemble the court to revise its proceedings, *so much of the sentence* may be confirmed as is legal:—or

wholly,
or in part.

II. *Confirmed, but not approved*, the legal effect of which differs in no degree from an approval, except perhaps in the case of detachment general courts martial, it being declared by the article and mutiny act, that the sentence, shall not be carried into effect, until *approved and* (5) confirmed:—or

Sentence confirmed; but not approved.

III. *Not confirmed; or Disapproved, and not confirmed*; the effect of which is to nullify the sentence: but, as before mentioned, [§728] not to the extent of exposing the prisoner to a second trial.

Sentence disapproved.

731. When the proceedings are quashed or set aside by proper authority on account of their illegality, or from any other circumstance, the person tried is "*relieved* from all consequences of his trial, and all record of it is to be erased." (6) It belongs to the Queen alone to pardon a prisoner who has been convicted by sentence of courts martial when the proceedings are confirmed. A confirming officer has

Illegal proceedings quashed and record erased.

The pardon of a convicted offender is the exclusive prerogative of the crown

(3) When any alteration is made in the finding, an instruction in 1873 pointed out that "it is absolutely necessary that the sentence in such revised finding should be given afresh, and it is not sufficient for the court to state that they adhere to their former sentence."—Q.R.App.B(11).

(4) In those cases [§712] where, in Her Majesty's foreign possessions, the confirmation of the officer commanding the forces is subject to the approval of the civil governor, and such approval is withheld, the confirming authority deals with the case as if no conditional

confirmation had been given to the sentence.

(5) M.A.12, A.W.124. The words "*duly approved*" in other clauses have been replaced by the word "*confirmed*," and the words "*approved and*" have elsewhere been expunged.

(6) Q.R. 96, p.62; S.23, p.35k. See §738. A soldier illegally convicted of a charge on rejoining for duty is settled with for full pay, less sixpence a day for subsistence while in confinement, subject to the power of the secretary of state for war (A.W.175) to withhold such soldier's pay.—R.W.686.

contrasted with
remission by a
confirming
officer.

How sentences
may be dealt
with on
confirmation.

Mitigation.

Corporal
punishment.

Forfeitures.

Cashiering and
reprimands.

The whole or
any part of
sentence
remitted,

or solitary
confinement
only,

but conse-
quences of
conviction
remain.

power to remit, and if from inadvertence he should have exceeded his authority in this respect, the minute of pardon is treated as a minute of remission. [§734] It was pointed out by Mr. Mowbray that "The distinction is not one of words only, as a pardon cancels the conviction as well as the sentence, whereas a remission affects only the sentence, leaving the conviction standing." (7)

732. In cases where the proceedings are confirmed, the Queen, or the officers thereto authorized by warrant under the sign manual may either cause the sentence to be put in execution; [§760] or they may, by the minute of confirmation, suspend, mitigate, [§733] remit, [§734] or commute [§735] the sentence awarded by the court.

733. The only provisions for mitigating sentences in the mutiny act or articles of war are in the case of corporal punishment, when a "confirming officer" is authorized to mitigate it, either by reducing the number of lashes, or by awarding, instead of such sentence, an imprisonment for any period not exceeding twenty days, with or without hard labour, and with or without solitary confinement, and corporal punishment to be inflicted in the prison, not exceeding twenty-five lashes; (8) and in the case of forfeitures when combined with penal servitude. [§739] But, by custom, and in virtue of the warrants for holding courts martial sentences of imprisonment with hard labour have been mitigated to simple imprisonment; cashiering to dismissal, [§116] and public reprimand to private.

734. Sentences may be remitted either in part, except a sentence of penal servitude, which cannot be awarded for a period of less than five years, (9) or wholly; or the whole or any part of solitary confinement may be remitted, leaving the imprisonment to take effect without solitary confinement. In this last case, there is no remission of any penalty consequent on conviction, [§133-140], such as forfeiture of service or good conduct pay. (10)

735. As to commutation it is to be particularly observed that there is no power even in the crown, (1) or with the

(7) J.A.G., 9th March, 1867.

(8) M.A.24. A.W.120.

(9) Penal Servitude Act, 1864, s. 20.

(10) Q.R.S.6,p.62. See § 731. As to remission of imprisonment after com-

mittal, see § 785. As to restoration of service, &c., see § 791.

(1) In the year 1727, when there was no provision in the mutiny act as to the commutation of punishment, the

consent of the prisoner under sentence, to alter the species of any punishment, except in accordance with the mutiny act and articles of war.

736. The mutiny act provides that it shall be lawful for Her Majesty, "*in all cases whatsoever*," instead of causing a sentence of cashiering to be put in execution, to order the offender to be reprimanded, or, in addition thereto, to suffer such loss of army or regimental rank, or both, as may be deemed expedient. (2)

Power to commute a sentence of cashiering.

737. The mutiny act provides that in all cases, whether of officers or soldiers, where the punishment of death has been awarded by a general court martial or detachment general court martial, it shall be lawful for the Queen, or, if in any place out of the United Kingdom or British Isles, for the commanding officer having authority to confirm the sentence, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude for any term not less than five years, or to suffer such term of imprisonment, with or without hard labour, and with or without solitary confinement, as shall seem meet to Her Majesty, or to the officer commanding as aforesaid. The articles of war (3) repeat this provision as regards officers commanding-in-chief abroad, and limit the solitary confinement [§ 121] to the periods prescribed in the one hundred and twenty-sixth article.

Judgment of death may be commuted for penal servitude or other punishments, by the Queen,

or the officer commanding in chief abroad.

738. The mutiny act also provides that in any case where a sentence of penal servitude has been awarded by a general or detachment general court martial, it shall be lawful for Her Majesty, or, abroad, for the officer commanding in chief the forces, instead of causing such sentence to be carried into execution, to order that the offender be imprisoned, with or without hard labour, and with or without solitary confinement, for any term not exceeding two years. The articles of war repeat

A sentence of penal servitude may be commuted for imprisonment.

King desired the opinion of the law officers of the crown as to whether he could mitigate a sentence of death. Their answer was, "that as the law now stands His Majesty cannot change the sentence of death into any other corporal punishment, because though it is a mitigation in favour of the criminal, yet it is giving a new and different judgment which the law doth not admit of."—10th Feb. 1727.—*Clode's Military Forces*, i. 510.

(2) M.A.25. This provision was

added to the mutiny act of 1837, and extends not only to the offence of false musters, which was then peremptorily punished by cashiering, under the provisions of the section to which it was annexed, but also to all offences under the articles and to offences under the seventy-sixth and eighty-seventh sections, where the cashiering is a consequence of conviction by the civil power.

(3) M.A.16. A.W.141.

this provision, as far as relates to commanders in chief abroad, and add the limitation as to solitary confinement. (4)

Forfeitures, when combined with penal servitude which has been commuted, may be dealt with as expedient.

739. Where an award of any forfeiture, or of deprivation of pay, or of stoppages of pay has been added to any sentence of penal servitude, Her Majesty, or, abroad, the officer commanding in chief Her Majesty's forces there serving, in the event of the sentence being commuted for imprisonment, may order such award of forfeiture, deprivation of pay, or stoppages of pay to be enforced, mitigated, or remitted, as may be deemed expedient. (5)

Corporal punishment may be commuted to imprisonment, or mitigated.

740. In all cases where corporal punishment forms the whole or any part of the sentence, the confirming authority may commute such corporal punishment to imprisonment not exceeding forty-two days, with or without hard labour, and with or without solitary confinement. (6)

Imprisonment in commutation may be in excess of ordinary term.

741. When sentences of penal servitude or corporal punishment are commuted to imprisonment, and the offender, at the time of such commutation, is under sentence of imprisonment or penal servitude, it is lawful to direct that such commuted sentence of imprisonment shall commence at the expiration of the imprisonment or penal servitude to which such prisoner shall have been so previously sentenced, although the aggregate of the term of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could be otherwise awarded. (7)

Remission of forfeitures and stoppages.

742. Lastly, the articles of war provide that, when any person has been sentenced by a court martial to stoppages of pay, the commander in chief with the concurrence of the secretary of state for war, or commanders-in-chief in India with the concurrence of the local government, may remit the whole or any portion of such stoppages in any case where such remission may appear to be conducive to the good of the service. (8)

PROMULGATION OF SENTENCE. Sentences confirmed by the Queen,

743. In the case of general courts martial, upon which Her Majesty's pleasure has been taken, her decision is communicated by letter to the general or other officer who con-

(4) M.A.20. A.W.142.

(5) M.A.21.

(6) M.A.24. A.W.120. The article also provides that the solitary confinement awarded in commutation of a sentence of corporal punishment shall in no case exceed seven days at a

time, with intervals of not less than seven days between each period of such confinement.

As to the mitigation by commuting a part of the award, see § 733.

(7) M.A.28. A.W.138.

(8) A.W.134.

vened the court martial, containing a copy of the charges, finding, and sentence, the proceedings being deposited in the judge advocate general's office. [§ 700] In the case of those general courts martial which are disposed of by commanders of the forces abroad, and of all district or garrison courts martial, the proceedings, when the minute of the confirming authority has been duly made, are forwarded to the prisoner's immediate commanding officer, and are returned by him as soon as possible to the judge advocate, or the president of the court, as the case may be, [§ 486] in order to their being by them transmitted to the judge advocate general in London.

how commu-
nicated ;
or by superior
officers.

744. The Queen's decision on the trial is not communicated to the troops through general, district, or regimental orders, except in such cases as the commander in chief signifies his special commands to that effect ; and in all such cases it is customary for the communication to be made by a general order addressed to the army at large. (9) The usual routine in all ordinary cases is for the general officer to communicate to the officer commanding the regiment to which the prisoner belongs, a copy of the official communication of the result of the trial which he receives from the military secretary, or, in the absence of the commander in chief, from the adjutant general. (10)

Promulgated in
orders in special
cases.

Ordinary
routine.

745. In cases of capital punishment, the confirmation, and, where required, the approval of the civil governor, [§ 711, 713] is promulgated, as in ordinary cases, or a special warrant, for the execution of the prisoner, is addressed to the officer commanding the division, brigade, or garrison, as it may happen.

Capital
punishment.

746. The sentences of general courts martial abroad are promulgated in general orders or otherwise at the discretion of the general officer. The sentences of district or garrison and regimental courts martial are also occasionally published in orders. (11) General officers not unfrequently take occasion of the publication of courts martial in orders to point to the consequences of misconduct, or enforce attention to points of discipline, or in the procedure of courts martial. The orders of the Duke of Wellington afford many valuable examples ; but it is most essential that the confirming

Promulgation
of sentence
abroad, and of
proceedings.

Remarks of
general officers
on courts
martial,
may be valuable
as bearing on
the discipline of
the army,

(9) Letter, Adjutant General, Horse Guards, 14th Nov. 1839.

(10) See warrant, § 1251.

(11) Q.R.S.22,p.25.

but, as in the case of the Simla court martial, ought not to trench on the independence at courts martial.

officer should be very guarded in any intimation in this public form of his disapproval of the judgment of the court. The commander in chief in India having announced in general orders why he was unable to concur in the acquittal of his aide-de-camp Captain Jervis on the first and second charges, and why he felt himself precluded from attending to the court's recommendation to mercy, the opinion of His Royal Highness the Duke of Cambridge was conveyed to him in the following terms: "It becomes the duty of the field marshal commanding in chief, under these circumstances, to inform your excellency that he cannot approve the remarks which you have thought fit to publish in your general orders, for His Royal Highness cannot ignore the fact that those remarks have a practical tendency to weaken the independence of courts martial, to bring contempt on military tribunals in the eyes of the public, and to affect the discipline of the army in a very material degree." (1)

Proceedings being lost, the next best evidence must be resorted to,

747. In the year 1842 the original proceedings of a court martial, after having been confirmed by the general officer, were lost in their transit to the officer commanding the prisoner's regiment: the judge advocate general, in reply to the adjutant general, gave his opinion, that the best evidence of the proceedings (the finding, sentence, and confirmation) having been lost, it was necessary to resort to secondary evidence, which in this instance was furnished by a memorandum transmitted by the general officer and by the testimony of the president of the court: his letter concluded as follows: "Under these circumstances this is amply sufficient, and,

(1) Despatch, 17th Jan. 1867, ordered by the House of Commons to be printed, *para.* 27 [§ 336]. The despatch concluded as follows:

"35 In conveying to you his views as to the part taken by your excellency with reference to this trial, the field marshal commanding in chief has performed a very painful duty; but there is still one point to which he must advert in justice to the court whose proceedings are under review.

"36 It is only due to the president and members of that court to state that, although in the opinion of the right hon. the judge advocate general there were some irregularities admitting of observation, unnecessary to ad-

vert to in detail, inasmuch as nothing took place to affect the legality of the trial, the perusal of the proceedings enabled him to say that he considered the court to have performed their difficult functions with '*marked impartiality and sound judgment.*'

"37. His Royal Highness entirely concurs in this opinion; and as he considers it only right and an act of justice to the officers composing the court that this opinion should be made known to them, His Royal Highness requests you will take measures for giving effect to his wishes in this respect, leaving it to your excellency to do so in such manner as may appear called for under the circumstances."

I think, the sentence should be promulgated in conformity with the memorandum, and should be carried into execution, as it would have been if the original proceedings were forthcoming." (2)

and the sentence may be carried into effect.

748. Where no minute exists, the same principle still applies (3)—that in the absence of the best evidence, resort must be had to the next best, which can be procured. It was officially decided, (4) with reference to the case of a soldier in the Grenadier Guards, that "if the president have a distinct personal recollection of the sentence, and of the substance of the charge, and the confirming authority certifies also that the proceedings were confirmed by him, the sentence may be carried into effect."

Case where no minute existed.

749. There is no court of law in which an appeal can be brought against the proceedings or sentence of a court martial when the prisoner and the offence are within its jurisdiction; nor in which the sentence can be reviewed. The privy council reviewed the sentence of a naval court martial in the remarkable case of Lieutenant Frye, of the Marines, in 1743. (1) In the present day the functions of a court of appeal are practically, if not formally, discharged by the judge advocate general, who is entirely independent of the military authorities, and responsible to Parliament in every case that arises. (2) When cases other than those which he has submitted to the Queen are officially brought before

REVIEW OF SENTENCE.

The sovereign alone competent to review the sentence of a court martial, when it has not exceeded its jurisdiction.

(2) J.A.G. 7th Dec. 1842.

(3) It is almost unnecessary to add that these precedents do not apply to the proof of previous convictions when given in evidence against a prisoner, who has been found guilty; in which case, the law points out what secondary evidence shall be sufficient; and there would not be the same occasion, in the interests of justice and of discipline, to relax the strict rule.

In addition to the chances of unavoidable accident, many cases will suggest themselves to officers of experience, where, if there was an impression that the sentence of a court martial could not be carried into effect, unless the original proceedings or precise proof of their exact tenor were forthcoming, it would give rise to attempts to make away with the requisite evidence, which it would be almost im-

possible to prevent, and most difficult to bring home to the guilty party.

(4) Letter, dated 30th Sept. 1845.

(1) 1 M'Arthur, 268. [§ 459*]

In the army the proceedings of general and district courts martial are subject to examination by the judge advocate general, when transmitted to his office. The regulations of 1873 do not require all the sentences of regimental and other courts martial to be brought under the notice of the commander in chief, by means of the monthly returns of courts martial [§ 755].

(2) See Mr. Mowbray's evidence. Courts Martial Commission, Q. 4167. It is admitted on all hands that the House of Commons should not attempt to constitute itself a court of appeal in military cases, but "it is beyond doubt that if a case of grievance arises, it has the power to interfere."—Mr. Walpole, H. C., 22nd May, 1865.

him for his advice, they are liable to be quashed, [§ 731] or otherwise dealt with as he may advise, and the observations he may make are communicated to the confirming authority.

Superior courts have power to examine the acts of members, and confirming officer.

750. It belongs to the Queen alone, or to such officers as she may depute, to abrogate or confirm the sentence: (3) but the power of the superior courts to enquire into the conduct of the president and members, or any individual member, of a court martial, or the confirming officer, against whom there may be alleged an undue exercise of authority, any excess of jurisdiction, or any illegality of proceeding, has been shown in several instances; and, on the other hand, a determination has been shown to protect their independence in the discharge of their judicial office. (4)

Extent of their action.

751. The superior courts at home, or in the colonies, grant a writ of *habeas corpus*, where probable ground is shown that a military prisoner, either before or after trial, is held in illegal custody. (5) The court of Queen's Bench will not grant a criminal information for any act unless it be committed from corrupt or vindictive motives. If an illegal act be committed merely by ignorance or mistake, the applicant may seek his remedy by indictment, or may bring an action for damages in respect to any injury he may have sustained.

To what courts proceedings for damages are restricted,

752. The eighty-ninth section of the mutiny act recognizes the liability of members and ministers. (6) of courts martial

(3) See the opinion of Lord Esckine given in the letter relative to Musprat, § 919. See also the decision of Lord Loughborough in the case of Serjeant Grant.—1 *H. Blackstone's Reports*, 69.

In Michaelmas term, 1833, Mr. John Waller Poe, late a lieutenant in the 55th Regiment, who had been dismissed His Majesty's service by sentence of a court martial, held at Chatham, in the October preceding, made an application in the Court of King's Bench for a prohibition of restraining the execution of the sentence. The lord chief justice (Denman) observed that supposing the case of *Grant v. Gould* (see before, § 63) to furnish some argument for a proceeding of this nature before the execution of the sentence, still it is impossible to discover what the court could prohibit after execution. He also remarked in de-

livering the judgment of the court, that the king had the exclusive, uncontrolled prerogative of dismissing any soldier or officer whom he pleased, with or without a court martial; and what the king had power to do, independent of any enquiry, he plainly might do, even though the enquiry should not be satisfactory to a court of law.

(4) See Sir Fitzroy Kelly, quoted § 699.

(5) See the case of Captain Douglas, § 351n; Lieut. Allen, § 780; Com. Storekeeper Moore, § 396.

(6) This includes not only provost marshals, keepers of prisons, &c., but also superior and other officers, and any persons ministerially concerned, in the execution of, or giving effect to, the sentence, or in the custody of the prisoner. Lieut. Allen, 82nd Regiment

to actions at law, in respect of any sentence, or of anything done in virtue of or in pursuance of any sentence: but restricts such proceedings to the courts of record at Westminster or in Dublin or India, or to the court of session in Scotland. This "must be understood not as applying to acts in all respects regularly done (for otherwise it would be useless) but for acts honestly though it may be erroneously done in the discharging of a duty." (7) The section provides treble costs to the defendant, in case he obtains a verdict, or the plaintiff becomes nonsuited, or suffers any discontinuance of the action.

and how the section is construed in law.

Treble costs to defendant.

753. The 11 & 12 Will. 3, c. 12, provides that governors and commanders in chief may be prosecuted and punished by the court of King's Bench, or by a special commission in England, for acts of oppression or crimes committed in colonies and plantations beyond the seas. And by the 42 Geo. 3, c. 85, it is enacted, that if any person whatever, employed in the service of His Majesty, in any civil or military station, office, or capacity whatever, shall commit any crime or offence in the execution, or under colour, or in the exercise, of his office, he may be tried for it in England in the court of King's Bench upon an indictment, or upon an information exhibited by the attorney general.

Officers are liable to be proceeded against in England for offence committed abroad in the exercise of their office.

(having been released on a writ of *habeas corpus*, as mentioned, § 780), obtained a verdict with 200*l.* damages in the Court of Common Pleas, on the 10th July, 1861, for false imprisonment, against H.R.H. the Duke of Cambridge, who, it was admitted, was answerable for the act of the adjutant general who gave the order for his committal.

He had previously obtained a verdict with 50*l.* damages against the governor of the military prison at Weedon, the learned judge who tried the case explaining to the jury in his charge that "The subordinate officers of the great ministers of government were liable to an action for their wrongful acts. There was, however, a great difference in this from many actions of this kind, in which the wrongful imprisonment was under an arrest for some crime which the plaintiff had not really committed. Here the plaintiff had been lawfully convicted and sentenced to imprisonment.

It was for them to say what the amount of damages should be, not treating the case as one of an arbitrary outrage on the liberties of the subject, and at the same time not regarding it quite so lightly as it had been represented by the counsel for the defendant."—*Times*, March 4, 1861.

(7) By Mr. Justice Willes. *Keighley v. Bell*, C.P. 4 Foster & Finlason, 798. The regulations lay down that when officers or soldiers are made defendants in criminal or civil proceedings, the defence must be conducted on the sole responsibility of the defendant, until the decision of the secretary for war is given. No assistance is given, nor is the cost of the defence reimbursed, when the act complained of was not one sanctioned by competent authority, or clearly within the prescribed course of the defendant's duty.—Q.R.(1868)784, amended, Army Circular, 1st Feb. 1870.

Other checks provided against abuse of power.

Responsibility of confirming authority.

Proceedings recorded.

Returns of courts martial, which are retained by general officers.

Formerly they were carefully examined by the general officer, and afterwards scrutinized at head quarters.

Confidential reports by generals inspecting at their annual inspection.

754. Undue exercise of authority by regimental or other courts martial, apart from the action of the common law courts, may, at any time, be made the subject of enquiry by superior military authority. Not only does a great degree of responsibility attach to the officer who confirms the sentence, but with a view to the prevention of abuse or irregularity, the whole proceedings of regimental and detachment courts martial are required to be recorded in the books of each regiment, signed by the president, and countersigned as approved by the commanding officer, and the original proceedings of every general and district or garrison court martial are transmitted to the judge advocate general.

755. A monthly return of courts martial is made up to the first of each month, containing the names of all men who have been tried during the preceding month, and is transmitted to the general officer under whose orders the corps is serving. Since 1873 these returns have been retained by him, and he is "held responsible that they are carefully examined, and any irregularities brought to the notice of the commander in chief." (8) Previously they had been forwarded through him, to the adjutant general of the forces, and in the column for remarks, the general officer was directed (9) to notice any irregularities which may have occurred, and to state what steps he has taken thereon, and also to explain any special case in which he may have thought it right to sanction a departure from the established regulations. These returns were then rigidly gone through at the Horse Guards, and informality or irregularity was brought to the notice of the parties concerned, or otherwise redressed, as the justice of the case might have required.

756. At the yearly inspection, which has now been substituted for the half-yearly inspections, general officers are required to report in the established form of confidential reports, under the head of courts martial: Whether any irregularity has occurred in the proceedings of courts martial, or in the execution of the sentences awarded by them: Whether the sentences appear to have been proportionate to the crimes. The inspecting general was formerly required to

(8) Q.R.S.22, p. 37. A recent order to the Under Secretary of State for War.
(G.O. 7 of 1875) directs a Return of Courts Martial (W.O. Form, 80) to be sent on the first day of each quarter

(9) Circular to General Officers, 4th May, 1831.

report whether the necessity of frequent punishment has been superseded by wise measures for the prevention of crime, and by the zeal and assiduity of the officers in their different stations to carry them into effect, and to maintain the discipline of the regiment by kind and considerate treatment of the soldiers ;(1) but any deviation from the spirit of this enquiry, would still find a place in the general observations appended to the report which "ought to give the result of continuous intercourse and observation, and not to be confined to an inspection at any particular time." (2)

(1) It is perhaps to be regretted that the questions reported upon in the confidential reports ceased to be printed in the Queen's Regulations in 1859. They served, not only for the purpose of practical instruction, but not unfrequently for tacit admonition also ;—and at all events, they brought before all ranks the principle upon which they were governed and the standard at which they were to aim, and according to which their own professional character, and the credit of the corps would be judged in the service.

(2) Q.R.S.5,p.20. — The existing Regulations moreover direct :—" Particular attention should be given to the examination of the regimental and troop, battery, or company defaulter books, with a view to ascertain how offences are dealt with in each corps, and whether due discrimination and judgment are evinced in awarding punishment. The confidential report should contain a full statement of the result of the inspecting general's examination of the defaulter books."—Q.R.S.5,p.36.

CHAPTER XVIII.

EXECUTION OF SENTENCE.

Immediate effect
is given to
finding of
acquittal.

757. OFFICERS and soldiers who are acquitted are released from arrest or confinement with the least possible delay after the finding has been confirmed. [§ 719] Soldiers are settled with for their full pay less a fixed reduction of sixpence a day for subsistence during confinement. (1)

Execution of
sentence,

758. Capital and corporal punishments are carried into execution in the presence of the division, brigade, garrison, or regiment, or of the guards and picquets of the several regiments in camp or garrison, as the nature of the court martial and of the charge, and as the convenience of the service may dictate. (2)

In case of
capital pun-
ishment by
shooting.

759. In cases of capital punishment by shooting, great ceremony is ordinarily observed; an execution party, consisting of ten or twelve men, commanded by a sergeant, is usually ordered from the prisoner's regiment, (3) and placed under the orders of the provost marshal. (4) The troops to witness

(1) R.W.686.

(2) Mitigated sentences of corporal punishment are an exception. See § 769.

(3) Pardoned delinquents or other defaulters were formerly ordered to form the execution party, but the better practice of late years has been to detail it from the roster. Consideration for the feelings of the men who are told off for this duty has led to the practice of their arms being loaded for them under the direction of the provost marshal, with the intention that he may see that at least one blank cartridge is used, and that the arms are returned indiscriminately to the party.

The firing party (*les tireurs*) in the French army consists of the four sergeants, the four corporals, and the four privates next for duty, and the execu-

tion takes place in presence of the corps to which the offender belongs, formed in line, and *without their arms*. — *Code pénal militaire*, section iv., articles 2, 4.

(4) Warrants to general officers, enabling them to carry the sentence into execution, also authorize them "to appoint a provost marshal, to use and exercise that office as it is usually practised in the law martial." — § 1256, 1262, 1267.

The article of war, "The provost marshal shall have a warrant to be done according to the sentence," has been omitted for a long series of years; but the practice has survived of issuing a warrant to the provost marshal for the due enforcement of a capital sentence.

the execution are formed on three sides of a square, the infantry resting on their arms reversed, and the cavalry dismounted, the prisoner, his irons, if any, having been knocked off, and his arms having been fastened behind his back above his elbows, and escorted by a detachment, is brought on the ground. The provost marshal heads the procession, followed by the band of the prisoner's regiment, drums muffled, playing the "dead march;" the execution party comes next; then four men, bearing on their shoulders the coffin; the prisoner, usually attended by a chaplain, or by a minister of his own persuasion, then follows; the escort last bring up the rear. The procession passes along the front of the three faces of the square, from left to right; brigades or regiments being in line, or in contiguous columns, as their numbers and the nature of the ground may dictate. As the procession reaches the flank of each regiment, the band of that regiment plays the "dead march" till the procession has cleared its front. On reaching the right flank of the square the music ceases; the prisoner is placed on the open face at the fatal spot marked by the coffin. The charge, finding, and sentence of the court, and the warrant or order for execution are read aloud; the chaplain, having engaged in prayer with the condemned, withdraws. The prisoner's eyes are then bandaged or covered, and the execution party moves up to within six or eight paces from the prisoner, and receives the word from the provost marshal. If its fire should not prove instantaneously effectual, it is said to be the duty of the provost marshal to complete the sentence of the court with his pistol. Ordinarily the fire of a file or two is kept in reserve for this painful occurrence. After the execution the troops usually move past the body in slow time, and are then marched to their private parades without music.

Capital punishment

by shooting;

760. Death, by hanging, is executed with less ceremony; the troops witnessing the execution being formed in square on the gallows as a centre; the charge, sentence, and warrant are read, and an executioner, under the direction of the provost marshal, performs his office. The troops are then marched off the ground, the provost marshal and the escort remaining till the body is cut down.

Capital punishment by hanging.

761. "The usual manner" of inflicting corporal punish-

Corporal
punishment,
infliction of;

ment, (5) is as follows: the brigade, garrison, regiment, or detachment, being under arms, is formed in some retired place, in the ditch of an outwork of a fortified place or fort, or a riding house to receive the prisoner, who is brought by an escort to the centre; the commanding officer, or the brigade major, the town major, or adjutant, as the case may be, proceeds to read aloud the charge, sometimes the proceedings, but invariably the sentence of the court and the approval; the prisoner being uncovered, and advanced a pace or two in front of the escort. The culprit is then directed to strip to the waist, and is tied to a "triangle," or three legs or poles, connected by a bolt at top, and separated about four feet at bottom; to two of its legs a bar is affixed; so that the prisoner's chest may rest against it, his ankles being tied or buckled to the legs. Halberds were sometimes rigged out for the purpose, whence originated the common saying, "bringing a man to the halberds," for bringing him to corporal punishment; at other times the prisoner is lashed to a gun-wheel, and receives on his bare shoulders twenty-five lashes, from the drummers of infantry, or the trumpeters and shoeing smiths of cavalry, in succession, till the punishment, in no case exceeding fifty lashes, is completed, or interrupted by order of the commanding officer; the drum or trumpet major counts each lash, or rather directs it, the lash not being inflicted till it is numbered; between each, a pause equal to three paces in slow time takes place, which is marked by the time taken to circle the cat round the head, or

(5) "Corporal punishment" is now used in the mutiny act and articles of war *exclusively* of the punishment of flogging. In the earlier mutiny acts and articles of war it was properly used for death and other punishments, (among which was imprisonment,) to which an offender was subjected in his person, as distinguished from his purse. A trace of the now obsolete usage was

still to be observed in the articles of war of the first few years of the present century:—"the penalty if a soldier sell or spoil his arms, &c.," under the 3rd Art., XII Sec., being to "undergo weekly stoppages of his pay, and besides suffer imprisonment or other corporal punishment" at the discretion of the court martial.

NOTE.—Although corporal punishment has ceased to be awarded by courts martial, the paragraphs referring to it have been retained from former editions of this work, as it may still be resorted to in the exceptional circumstances defined by the law. [§ 119]

formerly, in some cases, by taps of the drum. A commanding officer is not justified in prolonging the infliction beyond the usual time; and charges have been grounded upon the non-observance of such caution. (6) No punishment is to be inflicted but in the presence of a medical officer, whose duty it is to ascertain that the prisoner is in every respect capable of bearing the punishment. (7) Should any symptoms indicate the propriety of stopping the infliction, it is the duty of the medical officer to report to the senior officer on the parade, who directs accordingly. The cat-o'-nine tails consists of a drum stick, or handle of wood of the like length, having fixed to it nine ends of common whipcord; a larger description of cord, or the substitution of a rope, (8) could not be justified; each end is about sixteen inches long, and knotted with three knots, one being near the end: the drum-major sees that the ends are not entangled during the infliction, so as to produce a more serious blow than was intended, but that they are disengaged from time to time, and, if necessary, washed in water.

Corporal
punishment,

prolonging
time of, not
justifiable.

762. A previous preparation of cats, by steeping them in brine and washing them in salt and water during the punishment, has been made the subject of a charge against a commanding officer; and although the officer referred to (Lieut. Colonel Bayly, 98th Regiment) was acquitted "of all knowledge of, or participation in, the cruel and unprecedented practices of steeping the cats in brine, and of washing them with salt and water during the infliction of the punishments;" yet His Majesty was pleased to command that "the admonition" (1) to which he had "been sentenced by the court, should be communicated to that officer, accompanied by the expression of His Majesty's regret and displeasure, that punishments deemed necessary in their nature to the maintenance of discipline, and legally authorized, should have been inflicted in any corps in so cruel and unprecedented a manner as the evidence on the face of the proceedings clearly establishes to have been the case in this instance, and that so unquestionable a proof should have been afforded of neglect of duty on the part of an officer in command of any regiment or detachment of His Majesty's troops, as is too

Order on
irregular
infliction of.

(6) G.O.450.

(8) See case of Governor Wall, § 1109 n.

(7) Q.R.(1868)779.

(1) G.O.511.

Corporal
punishment.

clearly chargeable upon Lieut. Colonel Bayly, and as is justly so held by the court, when an occurrence so prejudicial to military discipline, and tending so manifestly to bring the army into disrepute, could have been preconcerted without his knowledge, and afterwards take place without his notice, in the dépôt under his immediate command."

Infliction of
sentence.

763. The commanding officer is in all cases responsible that the punishment is inflicted according to the custom of the service. His late Majesty declared upon the occasion of the irregularity above referred to, "that whatever may be the opinion or sentence of a general court martial, His Majesty will continue to require that officers will be held responsible for what passes in regiments under their command." The order making known His Majesty's sentiments on the subject, also contains the following passage: "It matters not whether such irregularities proceed from design, inattention, or ignorance, on the part of the commanding officer. Whatever may be the cause, it is equally clear, that the officer who may either authorize or allow such acts, or during whose command such acts may take place, is in no way fit to be entrusted with the charge of a body of troops; and it is, therefore, the imperative duty of the general commanding in chief, whenever such a case is brought forward, to make a special report of it for the serious consideration of His Majesty." (2)

Infliction of,
by right and
left-handed
drummers.

764. Although many years ago right and left-handed drummers were sometimes employed indifferently, yet it is obvious that this must have occasioned a vast increase in the degree of pain beyond that produced by punishing with right-handed drummers alone. It would therefore not be acting up to the letter of a sentence, which prescribes corporal punishment in the *usual manner*, to adopt a mode of infliction which greatly enhances the suffering, and which was at no time *uniformly* and *invariably* practised. (3)

(2) G.O.511.

(3) These observations, and those which were offered in former editions as to flogging on the breech, are happily obsolete, and may by some be deemed trifling; but the subject of them was one of great consequence to those soldiers who were exposed to corporal punishment. The lamented author of this work felt very strongly

that they were also connected with the best interests of the service, if he judged rightly of the feeling of the soldiers (which no one who knows soldiers, can doubt) on witnessing the modes of punishment upon which he animadverted, and which, though at one time justified, or rather palliated, by custom, were never frequent.—*Editor*, 1862. See note, page 316.

765. The practice of completing an awarded corporal punishment at a time subsequent to the first infliction, if the culprit was unequal to bear the whole at once, in the judgment of the medical officer in attendance, had been for many years discontinued, but was first forbidden by the regulations in 1837. (1)

Corporal punishment. Second inflictions of corporal punishment under one sentence illegal.

766. The attention of the general commanding in chief having been called to the punishment of a soldier of the 11th Hussars on a Sunday, his lordship remarked that it was well known that it is not the practice of this country to carry the penal sentences of the law into execution on that day; neither was it the practice of the army whether employed abroad or at home; and Lord Hill desired it to be clearly understood that the sentences of military courts are not to be carried into execution on Sundays, excepting in cases of evident necessity, the nature of which it could not be requisite for him to define. (2)

Military punishment not to be inflicted on Sundays.

except in cases of evident necessity.

767. The sentence of corporal punishment, upon a prisoner, under such sentence for any offence, who may effect his escape before it has been carried into effect, is to be inflicted upon his apprehension, and before putting him on his trial for breaking from confinement, desertion, or other subsequent offence, as the case may be, it being apparent that the non-infliction of corporal punishment, in such circumstances, might have a tendency to encourage attempts to escape by offenders under such sentence. (3)

Prisoners

under sentence of, and escaping, subject to, on return.

768. The strictest attention is enjoined to the precautionary measures to be taken in all cases to ascertain the state of the prisoner's health before any infliction of corporal punishment, the superior or commanding officer being ordered to require the medical officers to make the most minute inspection of every soldier under sentence of corporal punishment, whether it be awarded by general, district or garrison, regimental or detachment court martial, before he gives orders that the sentence be carried into execution. (4)

Cautions before carrying into effect,

769. The power of the confirming authority to commute or mitigate corporal punishment to imprisonment has been

Mitigated sentence of commitment.

(1) Q.R.(1868)780.

(2) G.O.553, 22nd April, 1841. given on a reference to the highest authority in the year 1844.

Q.R.(1868)778.

(4) Circular. Horse Guards, 10th August, 1846.

(3) An answer to this effect was

Corporal
punishment ;

commitment
must contain
order for ;
inflicted in
military
prisons.

PENAL SER-
VITUDE.
Sentence read
on parade.

In the United
Kingdom.

In India and
the colonies,
out of the
Queen's
dominions.

before noticed. [§ 733, 740] When prisoners are to undergo a mitigated sentence of corporal punishment within the prison, the commitment must contain a special order for such punishment with a certified extract of the sentence of the court. (5) Corporal punishment in a military prison is administered according to the usual practice of the service. (6) The infliction of such mitigated punishment, in no case exceeding twenty-five lashes, must be attended by a visitor, the governor, and medical officer (whose instructions thereon, for preventing injury to health are to be obeyed); (7) but warders and prisoners are not required to be present, unless deemed specially expedient. (8)

770. In cases of penal servitude and imprisonment, the charges, finding, and sentence are read on parade, the offender under escort and uncovered. The mutiny act (*sec.* 18 & 19) points out the steps necessary to be adopted when it is intended that any sentence of penal servitude shall be carried into execution for the term of the sentence, or for any shorter term; or when, by Her Majesty's gracious order, or in any place out of the United Kingdom or the British Isles, by the order of the officer commanding in chief the forces there serving, a sentence of death has been commuted [§ 737] to penal servitude. In the United Kingdom a notification is made in writing by the officer commanding in chief, or the adjutant general, or the secretary of state for war, to any judge of the Queen's Bench, Common Pleas, or Exchequer, in England or Ireland, who is thereupon required to make an order for the penal servitude of the offender. In Her Majesty's foreign dominions, or elsewhere beyond sea, a similar notification is made by the officer commanding the forces at the presidency or station where the offender may come or be, or in his absence by the adjutant general for the time being, to some judge of one of the chief civil courts in India, or the chief justice, or some other judge, as the case may be, in any other part of Her Majesty's foreign dominions, who makes order for the penal servitude or intermediate custody of the offender, which order being duly notified to the governor of the presidency or colony, he is required to cause such offender to be removed or sent to

(5) Q.R.(1868)778. M.P.R.153.
(6) M.P.R.13.

(7) M.P.R.117.
(8) M.P.R.15.

some other colony or place, (1) or to undergo his sentence within the presidency or colony where the offender was so sentenced, or where he may come or be in obedience to the directions for the removal and treatment of convicts from time to time transmitted from Her Majesty through a secretary of state. Out of Her Majesty's dominions, (2) the officer commanding is empowered to make an order in writing for the penal servitude, or intermediate custody of an offender, as if he had been sentenced to be imprisoned with hard labour during the term of his penal servitude by the judgment of a court of competent jurisdiction in the place where he may be ordered to be kept in such intermediate custody, or in the place to which he may be removed for the purpose of undergoing his sentence of penal servitude.

Out of the
Queen's
dominions.

771. By an addition to the mutiny act in 1866 it was provided (*sec.* 19) that, if any prisoner be brought to any place in the United Kingdom, to undergo any sentence of penal servitude which has been passed upon him by a court martial held elsewhere, and the judge's or officer's order shall not be forthcoming, and the judge advocate general shall certify that it appears from the original proceedings of the court martial whereby the prisoner was tried that he has been duly sentenced to penal servitude, and that for anything that appears to the contrary thereon such sentence is still in force against the said prisoner, then it shall be lawful for a secretary of state to direct the prisoner to be at once removed to a convict prison. (2)

When the
certificate of
judge advocate
general may
be applied for
at home if the
prescribed order
is not forth-
coming.

772. The term of penal servitude commences on the day when the original sentence and proceedings are signed by the president, except in those cases where the court [§667] or the confirming authority in the case of a commuted sentence, [§741] awards penal servitude to commence at the

Commencement
of term.

(1) "Much inconvenience and delay having been caused by military convicts arriving from abroad unaccompanied by the required legal order for their commitment, His Royal Highness the general commanding in chief desires that, whenever soldiers are sent home for the purpose of undergoing penal servitude, officers commanding will be very particular in ascertaining that the judge's order of committal is given to the officer in charge of such

prisoners."—*Circ. Mem. Horse Guards*, 12th June, 1881. See § 771.

The Colonial Regulations insert a form of order approved by the law officers of the crown, as revised in 1873, subject to adaptation to the provisions of the mutiny act in force (*C.R., Appendix*, No. 19), and direct that the order is to be sent to England with the prisoner, and a duplicate, by the first opportunity.—*See C.R.* 418, 419, 420.

(2) *M.A.* 19. *Q.R.S.* 17, p. 110c.

expiration of a previous sentence of penal servitude or imprisonment. The convict continues in military custody until the order is received.

Officers there-
upon cease to
belong to the
service; soldiers
are specially
dealt with.

773. Officers cease to belong to the service upon the confirmation of a sentence of penal servitude. (3) Soldiers sentenced to penal servitude may be discharged forthwith by order of our commander in chief; and it is provided by the articles of war that such discharge shall not affect the execution of his sentence. (4)

IMPRISONMENT,

place of; fixed,
by general
commanding
in chief, or
by superior and
commanding
officers,

774. Sentences of imprisonment, as has been already mentioned, [§770] are read on parade, and the prisoner is forthwith removed under escort to undergo the sentence. Courts martial have not noticed the *place* of imprisonment in their sentence, since the year 1844, which is appointed by the general commanding in chief, the adjutant general, the confirming officer, or by the officer commanding the regiment or corps to which the offender belongs or is attached. The order must specify the offence of which he shall have been convicted, and the sentence of the court, in addition to the period of imprisonment which he is to undergo, and the day and hour of the day on which he is to be released. The term, except when in addition to a previous sentence, commences on the day on which the original proceedings are signed by the president. (5)

who select it
according to
instructions
from superior
authority.

775. The officers authorized to appoint the place of imprisonment have thus the power in all cases of selecting the place, whether a civil gaol or a military prison, in which the offender is to be confined. General and other officers are to be guided in the selection of the prison by such instructions as they may, from time to time, receive from superior authority. (6)

Incorrigible
offenders to be
committed
to common
gaols.

776. All soldiers, who, in addition to an award of imprisonment, may have been recommended by courts martial for discharge with ignominy, or whose discharges may have been sanctioned on the grounds of continued and incorrigible misconduct, are to be committed to civil prisons. (7)

(3) A.W.20. A provision to this effect was inserted in the mutiny act of 1844. The previous year had presented the painful spectacle of an offender, upon whom the sentence of transportation for embezzlement had been confirmed by the commander in chief in India, being necessarily borne on the muster rolls as an officer, until

Her Majesty had declared she had no further occasion for his services.

(4) A.W.23. See Q.R.S.20,p.56-8, and § 793-4.

(5) M.A.30. See A.W.139.

(6) Circular. War Office, 18th April, 1844.

(7) Q.R.S.6,p.79. M.P.R.150.

777. At those stations where garrison or barrack cells, of approved construction, have been erected, and duly certified as fit for the confinement of prisoners, they are available for carrying into effect sentences of imprisonment for forty-two days, being the most extended period, for which imprisonment can be awarded by a regimental court martial. (8)

Provost cells available for periods of imprisonment, not exceeding forty-two days.

778. In other cases, prisoners are to be committed to one of the military prisons which have now been in operation for many years, and have caused a very great and most beneficial decrease in the number of cases, where it is necessary to have recourse to common gaols,—an expedient, as observed by Lord Hill (9) in 1830, which all officers concur in considering objectionable, “and which it would be very desirable to reserve, if practicable, for crimes of a disgraceful nature.”

The system of barrack cells and military prisons

779. A form of commitment, according as the prisoner may be sent to a military or other public prison or to garrison or barrack cells, is established by authority. (1) In calculating the period of imprisonment, the day on which the sentence commences, and that on which the prisoner is to be released, are both to be counted. (2)

prevents the necessity of having recourse to civil gaols.

In the established form of commitment.

Periods of imprisonment, how calculated.

780. The mutiny act had for a series of years provided for the removal in military custody of prisoners undergoing imprisonment under sentence of court martial, upon the order, of either the officer commanding the district, or garrison, or of the confirming authority, but attention having been drawn to a failure in these provisions by the case of Lieutenant Allen, (3) the judge advocate general, in conjunction with

Removal of prisoners in military custody, and change of place of imprisonment,

(8) Q.R. S.6,p.91.

(9) Circular, 24th June, 1830.

(1) Q.R. S.6,p.87. W.O. Form 219. M.P.R.152.

(2) Q.R.S.6,p.88.

(3) Lieutenant W. H. C. Allen, 82nd Regiment, was tried by a general court martial at Shahjehanpore, on the 13th February, 1859, for the murder of his native servant, and, having been convicted of manslaughter, was sentenced to four years' imprisonment without hard labour.

General Lord Clyde confirmed the sentence, and ordered him to be imprisoned in the fort at Agra; and, on the 29th November, 1859, gave a written order for his removal in military custody to England, there to undergo the remainder of his sentence. On arrival, he was successively committed

to Milbank, the military prison at Weedon, Newgate, and the Queen's Prison.

After having been imprisoned in this last prison for four months, he applied to the Court of Queen's Bench sitting *in banco*, for a writ of habeas corpus, upon the ground that he was detained in illegal custody, and that the authorities had acted under the impression that they had power to deal with his case under the sections of the mutiny act which applied to penal servitude.

Lord Chief Justice Cockburn, on the 24th Nov. 1860, pronounced the final decision of the court in favour of the application, observing that “It was not necessary to determine whether the 41st section of the mutiny act gave power to remove the prisoner; for, even if it did, the provisions of

Removal of
prisoners,

from civil
prisons in the
United
Kingdom,

in the colonies ;

In India ;

the war department, introduced an alteration into the mutiny act of 1861 with the intention of providing against the recurrence of a similar state of things. (4)

781. This may serve to show the very great necessity of adhering to the very letter of the statute, (5) which, as now modified, enacts that in the case of a prisoner undergoing imprisonment under the sentence of a court martial in any public prison, other than the military prisons, in any part of the United Kingdom, the general commanding in chief, or the adjutant general, or the officer who confirmed the proceedings of the court, or the officer commanding the district or garrison in which such prisoner may be, may give, as often as occasion may arise, an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place *in the United Kingdom*, or of being brought before a court martial either as a witness or for trial;—and in the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court martial in any public prison other than a military prison in any part of Her Majesty's dominions *other than the United Kingdom*, the general commanding in chief or the adjutant general of Her Majesty's forces in the case of any such prisoner, and the commander in chief in India in the case of

the act had not been complied with, and no legal warrant could be produced by virtue of which the keeper of the Queen's Prison could detain Lieutenant Allen in custody. His lordship referred to the 40th section, which gave power to the commanding officer of a regiment in any part of Her Majesty's dominions to make an order in writing upon the governor of any prison to receive a prisoner, and to the 41st section, which gave power to the commanding officer of the district to make an order in writing directing a prisoner to be removed to some other prison or place; and his lordship observed that there was no order in writing, under either of those sections, under which the keeper of the Queen's Prison could detain Lieutenant Allen. All that appeared was, that Lord Clyde, the commanding officer of the district, had directed an order to be issued to the governor of Agra for Lieutenant Allen's removal to Calcutta, to be sent to this country to undergo the remainder of his sen-

tence; but it did not appear that either the officer commanding the regiment or Lord Clyde had made any order upon the keeper of the Queen's Prison to receive Lieutenant Allen. The deficiency was attempted to be made up by an order under the hand of the adjutant general representing the commander in chief, and stating that Lieutenant Allen had been convicted by a court martial in India. That, however, was not a legal warrant, and, under the circumstances, the court was constrained, though unwillingly, to discharge the prisoner."

Subsequently to his release, Lieut. Allen entered ten actions against the authorities concerned in his illegal detention, and, as already mentioned, [§ 752] obtained damages in the two that were tried.

(4) Mr. Headlam, House of Commons, 19th July, 1861. 3 Hansard clxiv., 1245.

(5) M.A.31. (Mutiny Act, 1859, Section 41.)

any prisoner so confined in any part of Her Majesty's Indian dominions, and the general commanding in chief in any presidency in India in the case of a prisoner so therein confined, and the officer commanding in chief or the officer who confirmed the proceedings of the court at any foreign station in the case of a prisoner so there confined, may give an order for the removal of the prisoner to some other prison or place *in any part of Her Majesty's dominions*, or for his being brought before a court martial as a witness or for trial. The officer (1) who gave the order must also give an order in writing directing the governor, provost marshal, gaoler, or keeper of such other prison or place to receive such prisoner into his custody, and specifying the offence of which he has been convicted, and the sentence of the court, and the period of imprisonment which he is to undergo, and the day and the hour on which he is to be released. In the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court martial in any military prison in any part of Her Majesty's dominions, the secretary of state for war, or the general officer commanding the district or station where the prison may be situated, has the like powers in regard to the discharge and delivery over of such prisoners to military custody as may be lawfully exercised *by any of (2) the military authorities above mentioned in respect of any prisoners undergoing confinement in any public prison other than a military prison, in any part of Her Majesty's dominions.*

Imprisonment.
Removal of prisoners from civil prisons.

The officer giving the order of removal must also give an order for committal.

The secretary for war or the superior officer has the power of authorizing the removal, &c., of prisoners in military prisons, without reference to place.

782. The intermediate periods are to be counted as part of the sentence, the mutiny act providing "that the time during which any prisoner under sentence of imprisonment by a court martial shall be detained in military custody shall be reckoned as imprisonment *under the sentence*, for whatever purpose such detention shall take place." (2)

Sentences of imprisonment are continuous.

783. It is scarcely necessary to remark, that in the event of sickness requiring the removal of a prisoner to a military hospital, he may, on recovery, (should the remainder of his punishment not be remitted) be returned to imprisonment. (3)

Prisoner sick in hospital; may be recommitted on recovery.

(1) It will be observed that the same officer, who gave the order for removal, and not *any* of the military authorities mentioned in the section, must give the order of committal.

(2) M.A. 31.

(3) When in hospital, he is considered a prisoner, and forfeits his pay, as when actually imprisoned.

Prisoner making his escape, cannot be recommitted for an equivalent period.

784. As a prisoner's sentence of imprisonment expires with the period reckoned from the date of the commencement of the sentence, [§ 686] should he effect his escape from prison, the course to be pursued, on his recapture, is to prefer charges for that offence, [§ 363] and not to commit him to prison for an equivalent period: he may, however, be legally recommitted to prison under his sentence if he be retaken before the expiration of the period of his imprisonment.

REMISSION OF IMPRISONMENT.
General rule as to remission of imprisonment.

Power in the confirming authority.

785. The general rule with respect to the remission of imprisonment, as of other punishment, is that the confirming authority has the power at any time of remitting any portion at discretion. The Regulations used to point out that "In the case of district courts martial, the commanding officer may, if he should see reason, recommend a partial remission of the punishment to the general officer, who approved the sentence. In the case of regimental courts martial he has the power, under the provisions of the articles of war, of confirming, remitting, or mitigating the sentence at his own discretion." (4) The thirty-first section of the mutiny act, referred to above, [§ 781] provides for the case of prisoners confined in other than the military prisons, but it was explained in a circular memorandum, (5) that this provision does not extend to the buildings set apart as military prisons, which are placed by the act strictly under the superintendence of the secretary at war, and the visitors, appointed by the act and by his authority under it, and that no soldier committed to a military prison can be legally discharged from custody before the expiration of his sentence, without the secretary at war's sanction, or that of one of the general officers to whom he may have deputed his authority; and the commander in chief being of opinion that the remission of punishment should, in all cases, depend on the conduct of the soldier while in prison, his grace was pleased to direct that "when commanding officers or others to whom the secretary at war's authority has not been deputed, see fit to recommend the remission of a portion of the imprisonment awarded by a regimental or other court martial, the recommendation may be addressed to the visitors of the military prison to which

Exception arising from establishment of military prisons administered by the secretary for war,

with reference to soldiers committed to military prisons,

(4) Q.R.(1868)766. Imprisonment the Queen.
under sentence of a general court martial at home can be remitted only by (5) Circ. Mem., Horse Guards, 20th May, 1847.

the soldier shall have been committed, for their consideration and approval, previously to his release by competent authority."

Remission of imprisonment

786. The circular also pointed out that it was "to be clearly understood that this order has reference only to the remission of imprisonment subsequent to committal, and that it was in no manner intended to interfere with or restrict the exercise of mercy by commanding officers or others in remitting or diminishing the amount of punishment awarded to soldiers when confirming the sentence of courts martial."

does not affect the exercise of mercy by confirming authority before committal.

787. It is provided by the rules and regulations for the military prisons that "If it should at any time appear to the visitors, from the representation of the governor and chaplain, or their own observation, that the conduct or demeanour of any prisoner has been particularly marked by a soldierlike submission to the discipline of the prison, and attention to the duties required of him, they are empowered to make a special report of the circumstances to the secretary at war, or to the officer to whom he may have delegated authority to remit sentences, (6) accompanied by such recommendation as to a remission of a portion of the prisoner's sentence by the proper authority as they shall see fit." (7)

Visitors may recommend prisoners for remission of a portion of their sentence,

788. The sentence of cashiering is communicated to the prisoner either privately, or publicly on parade, or (as the sentence was formerly worded) at the head of his regiment or corps. (8) Dismissal is not to be communicated in public. Officers who are cashiered or dismissed receive pay to the date on which the decision to that effect is communicated to them. (9)

which the superior officer, if deputed by the secretary at war, may order.

789. In the case of a non-commissioned officer, or an artificer having the rank of a non-commissioned officer, being reduced to the ranks, either the proceedings are read, and

CASHIERING OF OFFICERS, private or public. Dismissal.

REDUCTION OF NON-COMMISSIONED OFFICERS, public

(6) The secretary at war, by letter dated the 27th February, 1847, gave full authority to the generals commanding districts and stations in which the military prisons are situated, to remit, on the recommendation of the visitors, any portion of the sentence of a prisoner confined therein, without waiting for his approval, except, at home, in the case of a prisoner under sentence of a general court martial.

(7) In the order to the governor for the release of any prisoner, in conse-

quence of a remission of his sentence, the officer having authority is required to state briefly the circumstances under which he has deemed it expedient to grant such order. M.P.R.16.

(8) See an additional aggravation, § 115 a.

(9) R.W.222. In India cashiered officers receive a subsistence allowance up to the date of embarkation, and rupees 868,,6,,9 passage money, for all ranks, to Europe.

or private.

the insignia of his rank removed from his arm, upon the parade, which is the usual course when it is necessary to make an example, or when imprisonment or other punishment is added to reduction; or else the sentence is made known in orders and the prisoner is released from arrest and ordered to return to duty in the ranks.

FORFEITURE OF SERVICE,

entered in soldier's record. Forfeited medals.

Restoration of service forfeited on conviction of felony or desertion, or by sentence of court martial,

must be approved by the Queen.

Soldiers establishing claims for restoration by good conduct,

are recommended twice in each year.

DISCHARGE WITH IGNOMINY, in order to rid the service of

790. Forfeitures of service by sentence of court martial, or on conviction of desertion, [§ 185] or wilful maiming, or tampering with eyes, [§ 219] or upon his trial for desertion being dispensed with, [§ 192] or on conviction of felony, take effect on the confirmation of the sentence, and, (as also deductions of service by reason of imprisonment or otherwise) are inserted periodically in the register of soldier's services. (3) Forfeited medals are transmitted to the adjutant general for disposal. (4)

791. Soldiers who have forfeited their service, either absolutely or in part, are not left to serve on without the hope of regaining the advantages accruing therefrom. The articles of war (5) humanely and wisely provide that any such soldier, if he shall have subsequently performed good, faithful, or gallant services, may, on the same being duly certified by the commander in chief, (6) be eligible to be restored to the benefit of the whole or of any part of his service;—and, should the restoration be approved by the Queen, Her Majesty's order for the same will be signified through the secretary of state for war. Applications for the restoration of forfeited service, in the case of those soldiers who have become eligible therefor, in the terms of the Queen's Regulations, are to be made on the 1st January and 1st July of each year, in a prescribed form, and addressed to the adjutant general. (7)

792. The following most important general order was issued on the 1st May 1872:—"The confidential letter to general officers, dated Horse Guards, August 8, 1870, No. 110, General Order, No. 1, is hereby cancelled, and commanding

(3) A.W.168. Explanatory Directions, 482. See § 739.

(4) Q.R.S.21,p.11. See next note.

(5) A.W.47, 169. Such restoration of service includes the restoration of any medals earned previously to conviction. R.W.564c. Applications for the restoration of forfeited medals

are to be made by commanding officers of corps. Q.R.S.21,p.12.

(6) The conditions are laid down. Q.R.S.6,p.645.

(7) Q.R.S.6,p.66. A revised form (W.O.F. 435) has been adopted G.O. 27, 1st April, 1875.

officers will henceforth use their discretion in confirming or remitting sentences of discharge from the army, according to the character and previous history of the prisoner, it being desirable to rid the army of all incorrigibly bad characters." (1) And it was further directed by a general order 1st July 1872, that "as soldiers sent to civil prisons at home, and sentenced to be discharged with ignominy, will be furnished with plain clothes on discharge from prison, the escorts who conduct such prisoners to civil gaols will take back with them their regimental tunics, caps, and trowsers." (2)

bad characters.

Offenders deprived of their military uniform.

793. In the event of the sentence of discharge with ignominy being set aside in consequence of informality, the commander in chief has authority to order the discharge of the soldier, or to authorize general officers commanding on foreign stations to direct his discharge. (3)

Power to discharge soldiers lodged in the commander in chief.

794. Soldiers serving abroad who are ordered to be discharged with ignominy, are to be sent home as prisoners, but not to be kept in confinement during the passage. (4)

Offenders abroad, sent home for discharge.

795-807. A soldier discharged with ignominy or expressly on account of bad character, (5) whether from his own corps or at the termination of imprisonment from a civil or military prison, receives a subsistence allowance, and railway and passage warrants to convey him to the place of his enlistment, or to his home if not more distant; or a money allowance if conveyance by rail or steamer cannot be provided.

Travelling expense of men discharged with ignominy.

(1) G.O. (1872) 44.

(2) G.O. (1872) 64. See the evidence of Lieut. General Lord W. Paulet, Adjutant General, 2nd April, 1868.—*Courts Martial Commission*, Q. 1460. The ceremonial degradation or drumming out has been dispensed with since February, 1868.

(3) A.W.20. The Queen, by prerogative, has in like manner the absolute power of dispensing with the services of commissioned officers, without trial, or after a verdict of acquittal.

(4) Q.R.S.20, p.55.

(5) Q.R.S.20, p.57,58.

CHAPTER XIX.

OF EVIDENCE.

"EVIDENCE;"
how employed
with reference to
the practice of
courts martial.

808. EVIDENCE may be defined "testimony upon which a fact is believed," and, considered in relation to the practice of courts martial, and as employed in the oath taken by members, it includes all the means, exclusive of mere argument, or comment, which the law allows as fit and appropriate for the purpose of arriving at the truth in any matter submitted to the determination of a court martial. These are—

Oral or parole,
written or
documentary.

I. "Parole" or "Oral" testimony of witnesses examined *vis à vis* in court as to facts within their own knowledge;

II. Written or Documentary evidence produced in court.

Matters judicially
noticed by
court,

809. There are also certain matters which courts martial are bound to notice judicially. [§1022] These, therefore, the members are presumed to know without requiring proof, though they may "refresh the memory" by resorting to such means of reference as may be at hand. "Thus, if the point at issue be a date, the judge will refer to an almanack; if it be the meaning of a word, to a dictionary; if it be the construction of a statute, to the printed copy." (1) The members also inspect for themselves any things which may be sufficiently identified by evidence and produced to the court as material to their decision; or they may leave the place where the court is sitting for that purpose, as also "to have a view of any place for the better understanding of the evidence." (2)

and things submitted to their
own eyes.

The laws of evidence essentially
the same in
courts martial
and in ordinary
criminal courts
of England.

810. The rules of evidence in the criminal courts of England,—with certain modifications not involving any principle and for the most part established by express legislation in the mutiny act and articles of war—are those which guide courts martial. Mr. Serjeant Marshall, when he appeared

(1) Taylor, 30. As to books of (2) See § 429 & 523. Taylor, 513—reference, &c., see § 490. 520.

for Serjeant Grant [§65] in the court of Common Pleas, "assumed that a court martial was the creature of the mutiny act," (3) and laid it down as an indisputable principle, the truth of which it would indeed be difficult to combat, "that whenever an act of parliament erects a new judicature, without prescribing any particular rules of evidence to it, the common law will supply its own rules, from which it will not allow such newly erected court to depart." (4) The English law of evidence so established is equally binding upon courts martial when held beyond the jurisdiction of the English courts, even when held in Scotland, [§942 *n*, 972] where, as stipulated at the Union, the civil courts are governed by the Scotch law. [An addition to the mutiny act of 1874 (*sec.* 101) enacts that, "No court martial shall in respect to the conduct of its proceedings, or the reception or rejection of evidence, be subject to the provisions of the '*Indian Evidence Act*, 1872,' or any act of any legislature, other than the Parliament of the United Kingdom."] But though everywhere courts martial carry with them the same law of evidence (5) by which to decide whether questions to witnesses

Courts martial carry with them the *lex fori*, thus established, or—whatever may be the *lex loci* where they may be convened,

or the provisions of the Indian Evidence Act.

(3) This assumption must be understood of the legal position of courts martial as they are now convened, rather than of their historical [§ 1] position.

(4) 2 Blackstone's Reports, 27.

(5) "The Indian Evidence Act, 1872," came into force on the 1st of September, 1872. It premises that "It extends to the whole of British India, and applies to all judicial proceedings in or before any court, including courts martial."

If this mention of courts martial extended to courts martial held under the mutiny act, it would have been necessary to modify the statement in the text; but it is evident that this clause must be read as a part of the general law, and, in the absence of official information, it may be presumed that, although the limitation is not expressed in the local act, it is to be supplied by reference to the implied intention of the imperial legislature, and also by the express words of the act of parliament which established the local legislature; and therefore, that the Indian Evidence Act is intended to extend only to courts martial held upon "officers, or soldiers, or followers of Her Majesty's

Indian Army, *being natives of India*," respecting whom the mutiny act (*Sec.* 1) expressly provides "that nothing in this act contained shall in any manner prejudice or affect any articles of war or other matters made, enacted, or in force under the authority of the Government of India."

In the first place, apart from the obvious inconvenience of exposing courts martial to the enforced adoption of a fluctuating system, according as they may be assembled, where Scotch, or Indian, or French, or Dutch, or any other foreign law happened to be the *lex loci*—even if the power of the Indian council was not specially restrained in this respect—it is not to be conceived that the imperial legislature would establish a court for imperial purposes, with jurisdiction within all the Queen's dominions, and in foreign parts (*M.A.* 15), and refer it to a criterion by which to ascertain what questions it may legally demand of the witnesses before it, that criterion being the rules of evidence as enforced in the courts at Westminster, and nevertheless contemplate these rules being superseded by any local regulations, which might pretend to overrule

are such "as the court may legally demand of them;" (6) and everywhere the mutiny act provides for the attachment of witnesses who "refuse to give evidence," . . . "or to answer all such questions," (6) the legal process varies with the court in which proceedings against the witness may be taken, according as it is in England, Ireland, Scotland, or the Queen's dominions elsewhere.

its paramount authority, unless in any case it had made express provision for vesting this power, or recognizing its existence in the subordinate legislature.

Now there is no such provision either in the mutiny act, or in any other act of parliament, as respects the Indian law of evidence; and the fact that there is none, is all the more significant, because the mutiny act (M.A.101) expressly recognises the Indian penal code for the time being as the law of courts martial for the trial of civil offences in India.

But besides these more general considerations from the antecedent improbability of such a course, and the fact that the imperial legislature does not provide for the action of the Indian legislature in this behalf, such action is expressly barred by "The Indian Councils Act" (24 & 25 Vict. c. 67), passed in 1861:—

Sec. 22. "The Governor-General in Council shall have power . . . to make laws and regulations . . . for all persons . . . and for all courts of justice whatever. . . . provided always that the said governor general in council shall not have the power of making any laws or regulations which shall repeal or in any way affect the provisions of this act, . . . or any of the acts for punishing mutiny and desertion in Her Majesty's army, or in Her Majesty's Indian forces respectively; but subject to the provision contained in the act of the third and fourth year of King William the Fourth, chapter 85, section 85, respecting the Indian articles of war."

The question of law and of binding force on courts martial would be the same if the Indian Evidence Act were merely a codification of the English law of evidence. As a matter of fact, it differs from it in many particulars, so that, admirable as it is in the main, from the perspicuous definiteness of its language, and the logical method of its arrangement, it is not available for the members of courts martial,

even as a text-book. To give a single instance (*sec.* 132):—"A witness shall not be excused from answering . . . upon the ground that the answer will criminate, or may tend directly or indirectly to criminate such witness." There is a proviso that the answer which the witness is compelled to give shall not subject him to arrest, or be proved against him in any criminal proceeding, but, as is well known, [§ 961] such compulsion of the witness is directly contrary to English law, as embodied in the statute. [§ 913]

The question is not whether this or any other variation from English law in the Indian, or any other local code, is, or is not, an improvement upon it, but whether such variation can be accepted as law by courts martial in the face of the court martial oath, and the fact that the authority of parliament is necessary to alterations in the English law of evidence by which they are bound to abide.

If the view here taken be correct, it will follow that any pretence of local legislatures to impose the local law upon courts martial held under the mutiny act, or any regulations by military authorities purporting to enforce such unauthorized legislation, are as little founded in law as it would be to appoint the local magistrate to be president, or to require the court to apply the thumb-screw to a reluctant witness.

—*Editor*, 1872.

[The writer has since learnt that a local general order (Simlah, August 5, 1872) had prescribed the Indian Evidence Act for the guidance of all courts martial in India; and that, it having appeared to the authorities in that command that the arguments in the above note were *incorrect statements*, a reference was made to the highest authority in this country, which led to the declaration of the law in the mutiny act, which is inserted in the text within brackets.]

(6) M.A. 12.

811. It is not within the design of this essay to enlarge upon the law of evidence, or to attempt a scientific inquiry as to the principles upon which it is founded; and it will perhaps be more practically useful to quote largely from Phillips, Starkie, and other standard works, and now also to refer to "Taylor on Evidence," as being the book officially recommended for officers who are desirous of qualifying themselves for employment in the judge advocate general's department. [§462] The general maxims and technical rules regulating the production of evidence will first be pointed out [§812-872]: and then the classification of evidence as direct or positive, and circumstantial or presumptive evidence [§873]; the means of procuring the attendance of witnesses, punishing false witness, &c. [§890]; the competency of witnesses [§910]; their examination, [§940] their cross-examination [§971] and re-examination [§981]; the impeaching of their credibility [§979]; admissions by parties and the confession of the party charged [§990]; and lastly the rules of written or documentary evidence. [§1007]

Subject of this and the following chapters.

Arrangement of summary of law of evidence.

General Rules as to the Admission of Evidence.

812. First, [§813] *That the evidence, on either side, must be confined to the points in issue*; Secondly, [§829] *That the point in issue is to be proved by the party who asserts the affirmative*; Thirdly, [§831] *That it is sufficient to prove the substance of the issue or charge*; Fourthly, [§856] *That hearsay is not evidence*; and Fifthly, [§865] *That the best evidence must be produced, which the nature of the case will admit of.*

GENERAL RULES.
Evidence must be relevant; proved by assessor; sufficient;

not hearsay; nor secondary.

813. *First.*—The evidence on either side must be confined to the points in issue, and all testimony ought to be rejected which is foreign to the charge. This rule cannot be too strongly insisted on by courts martial. Enquiries as to remote or irrelevant facts, from which no fair and reasonable inference can be drawn as to the truth of the matter before the court, must always waste the time and distract the attention of the court, and not unfrequently tend to prejudice and mislead them. Neglect of the spirit of this rule is visited by marked disapprobation. (7)

Evidence confined to points in issue.

(7) G.O., 29th August, 1803. Court Dragoon Guards. "His Majesty, adjutant on Captain Barlow, King's verter to the voluminous minutes,

Relevancy of proof.

Collateral facts are not to be excluded when they raise a fair inference as to the matter in issue, or principal fact.

814. This rule, so important to be well understood, arises from the very object of the court in receiving evidence, which is to discover the truth as to the questions of fact involved in the charge—not as to other facts. In applying it, however, it is necessary to consider the view, with which evidence may be offered, in order to ascertain whether the proof of a particular fact, so offered in evidence, may or may not be material to the enquiry; and hence, in the exercise of a sound discretion, to decide as to admitting or rejecting it. It is evident that some facts or circumstances, which are not immediately and directly involved in the charge (or which are not “in issue”), may nevertheless be so connected with, or contrariwise so incompatible with, a fact that is in issue (or so relevant to it), as to afford grounds for an inference to prove or disprove it; and, therefore, evidence to prove them ought not to be disallowed, provided the court shall be satisfied as to their relevancy.

Relevancy of cross-examination, of defence.

815. A question that would have been irrelevant and improper on the examination in chief may be rendered necessary by the course of a cross-examination. Evidence is admissible to prove or disprove any attempt at subornation of witnesses. (8) The prisoner is not debarred from entering upon such incidental matters as make his history of the transaction, and his own conduct, consistent and natural. Enquiry into other facts, besides those put in issue by the charge, may often be wholly irrelevant; but sometimes they may bear on the point in issue and afford presumptive proofs. On a charge of stealing—for example—though it is not material, in general, to enquire into any other taking of goods besides that specified in the charge, yet for the pur-

Proof of other transactions, on

a charge of stealing.

noticed that the proceedings appear to have been drawn into that length by the court martial having, contrary to their own declared opinion, allowed matter to be brought before them, which did not form a part of the charge in question, and by their having, in some instances, received evidence which was not properly admissible.”

G.O. 8th Nov. 1845. Court martial on Lieut. Hyder, 10th Royal Hussars. Her Majesty was pleased to “remark that much irrelevant matter appears to have been gone into, and more particularly that the character of a witness

for the prosecution was irregularly and unjustly sought to be impeached by examining witnesses to particular facts supposed to have taken place many years since, and unconnected with the matter before the court; whereas, according to established law and practice, evidence to the general character of the witness for veracity was alone admissible; and furthermore, that witnesses were irregularly examined to contradict the evidence of that witness on matters totally irrelevant to the issue.”

(8) Taylor, 352.

pose of ascertaining the identity of the person, it is often important to show that other goods, which had been upon an adjoining part of the premises, were taken in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the owner's house on the night of the robbery; and, in that point of view, it is material. Thus also, to prove the crime of arson, it may be shown that property which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner.

on a charge of
arson;

816. On a charge of desertion, it may be admissible to enquire into the fact of (*not* the facts attending) a highway robbery, committed by the prisoner on the night he absented himself, and for which he had been tried and convicted by a civil court. The crime of desertion, depending on the *intention not to return*, might be inferred, in connection with other circumstances, from the commission of a heinous offence; (1) and such collateral evidence is admissible to prove the intention of the accused.

on a charge of
desertion;

817. No rule is better established than that the prosecutor cannot give general evidence of bad character against a prisoner as an argument for his guilt. On a charge of murder he cannot give evidence of the prisoner's conduct in respect to other persons to prove a murderous or bloodthirsty disposition; but former attempts by him to assassinate the deceased are admissible as proofs of intention; as are also former menaces or expressions of vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the murder in question. (2)

collateral facts
are admissible in
proof of malice;
as, for example,
on a charge of
murder;

818. In support of a charge for malicious, disrespectful, or unbecoming language, addressed by word of mouth, or written to, or used of, a superior officer at a stated time, or in a particular letter; after having proved the words in the charge, the prosecutor, to show the spirit and intention of the prisoner, may prove also that he spoke or wrote other disrespectful or malicious words on the *same subject*, either before or afterwards, or that he published or disseminated

and on other
charges implying
malice.

(1) A conviction of highway robbery in the United Kingdom would, from the sentence awarded, in all probability render inexpedient a subsequent trial for desertion; but, within the experience of the author, the case here supposed actually occurred.

(2) Archbold, 202.

Collateral facts admitted, where malice is imputed.

copies of the letter set forth as disrespectful in the charge. This evidence is admissible, not in aggravation of the crime charged, but for the purpose of proving the deliberate malice or disrespect imputed in the charge; and the prisoner may give in evidence, as negating a deliberate purpose, or as palliating though not justifying his conduct, that he had been provoked to act as he had done by the conduct towards him of such superior. (3) So, on an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that at another time the prisoner intentionally shot at the same person. (4) On the other hand, expressions of goodwill and acts of kindness on the part of the prisoner towards the deceased are admitted for the defence.

Conduct and sentiments of prisoner on particular occasions not charged,

819. Where intention is put in issue by the nature of the charge, as where a prisoner is charged with treason, or with a design to undermine the influence of the commanding officer, an inquiry may be allowed into the conduct and sentiments of the prisoner on particular occasions, but still with reference to the overt act laid or specified in the charge and to the transactions which are proved against him. The intention of one particular act may be best evinced by other contemporaneous actions; but in this necessary relaxation of the rule under consideration [§ 813], great caution is needed to prevent injustice to the prisoner by extending the enquiry to matter wholly unconnected with the charge. It would be the height of injustice to allow such an attack upon him as would involve the necessity of his entering unprepared and at once upon the defence of every action of his life.

on a charge of conspiracy.

820. On a prosecution for offences involving a charge of conspiracy entered into by the prisoner then under trial, general evidence of the existence of the conspiracy charged against him and not relating to the particular conduct of the prisoner may be received in the first instance, though it cannot affect such prisoner, unless it be afterwards brought home to him by showing his connection with the conspiracy. (5)

(3) Taylor, 355-6.

(5) The Judges, Queen's trial. 1

(4) Taylor, 358. Rex v. Voke. Russell & Ryan, 531. Phillips, 515 Taylor, 540.

821. On the consideration of a charge of mutiny, or exciting mutiny, it may be important to ascertain how far the acts or declarations of co-mutineers, in furtherance of a concerted scheme, may be received in evidence against a particular prisoner, after *prima facie* proof has been given of the existence of a plot, and of the connection of the accused therewith. Precedents in trials before courts of civil judicature for treason and conspiracies are directly applicable to trials before courts martial for mutiny and sedition. The law is thus stated in the last edition of *Phillips on Evidence*. In prosecutions involving a charge of conspiracy it is the established rule, "that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the number, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law, as well as in sound reason, the act of the whole party: it follows, that any writings, or verbal expressions, being acts in themselves, or serving to explain other acts, and so being part of the *res gestæ*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in furtherance of a common design."(6)

Acts or declarations of co-mutineers, analogous to

acts and declarations of co-conspirators.

Writings or words, being part of the transaction (*res gestæ*), are evidence against co-conspirators.

822. "But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had as to the execution of a common design, the evidence is not within the principle above mentioned: it altogether depends upon the credit of the narrator, who is not before the court, and therefore it cannot be received."(7)

Statements of conspirators when not part of the transaction, being simply narratives or confessions of past events, are treated as *hearsay*, and not evidence against them.

823. "It is in consequence of the distinction between writings or declarations which are a part of the transaction, and such as are in the nature of subsequent statements, but not part of the *res gestæ*, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators, whether it was before or after the prisoner's apprehension. Thus on the trial of Watson, some papers, containing a variety of plans and lists of names, which had been found in the house of a

Writings in possession of co-conspirators before apprehension, admissible against prisoner.

Papers found in the house of co-conspirators.

(6) 1 Phillips, 157-8. Taylor, 540-1. (7) 1 Phillips, 160. Taylor, 542.

co-conspirator, and which had a reference to the design of the conspiracy, and were in furtherance of the plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received in the case, inasmuch as there was strong presumptive evidence that they were in the house of the co-conspirator *before* the prisoner's apprehension, for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a case cited from Hardy's case, where the papers were found, *after* the prisoner's apprehension, in the possession of persons who possibly might not have obtained the papers until afterwards." (1)

Acts and
declarations of
prisoner when
evidence for him.

824. As in trials for conspiracies, whatever the prisoner may have done or said at any meeting alleged to have been held in pursuance of the conspiracy, may be given in evidence against him on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved in his behalf: for his intention and design, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single isolated act or declaration. (2)

Evidence as to
character of
prisoner.

825. The general rule might seem to require that evidence, as to the character of the accused, should have specific reference to the nature of the charge; but, though evidence of bad character is not admitted against the prisoner until after a finding of guilt, it has ever been the practice of courts martial, confirmed and enforced by a general order in 1830, (3) to admit evidence as to the prisoner's character, *offered by him*, whatever may be its nature, immediately after the production of his witnesses to meet the charge. A prisoner is even permitted to put in proof particular in-

Called by him

(1) 1 Phillips, 161-2. Taylor, 543. A question also arose, in the same case, as to the admissibility of a paper found among those before mentioned, which contained written questions and answers of a description calculated to excite mutiny in the army; this paper was withdrawn by the attorney-general on account of some doubt expressed by the court whether it had been clearly proved that it was intended to have

been used in furtherance of the common purpose. But the observations of Mr. Justice Abbott (afterwards chief justice) tended to show that the question of its admissibility in evidence, depended not on its having been printed or circulated, but on its reference to the treasonable practices charged in the indictment.

(2) 1 Phillips, 516.

(3) Horse Guards, 24th Feb. 1830.

stances wherein his conduct may have been publicly approved by superior officers; or, if a soldier, he may call for the production of the defaulter's book to prove there are no entries against him, or none of a serious character. The case is not likely to arise before courts martial, but the prisoner's witnesses to character may be cross-examined by the prosecutor, either as to particular facts, or as to the grounds of their belief, and evidence as to general bad character is in such case admissible. (4) The prisoner cannot claim the benefit of a good character when in point of fact his true character is far otherwise; and if he produces witnesses to mislead the court, the falsehood should be contradicted.

may be met by
rebutting evi-
dence.

826. The court was for the first time, by the same order, authorized to call witnesses to enquire into the prisoner's character, but only *after* a sentence of guilt had been pronounced; this is now ordered by the regulations in every case where a *soldier* had been found guilty. (5) A prisoner before a court martial is always alive to the benefit of character; and, excepting in particular cases, applying chiefly to officers, is prepared to abide the consequences of not producing evidence to this point. Care is taken that the evidence as to character, recorded by the court, may not influence the finding; but the requiring it is subject to the inconvenience that, in some cases, it may unavoidably let in much extraneous matter. A prisoner cannot be debarred from cross-examining as to particular facts, and as to the opportunities which the witness may have had of forming the opinion he has given [§ 635 *n*]; nor can he be prevented from rebutting evidence of bad character by the testimony of fresh witnesses; [§ 825 *n*] and it is conceived that a reasonable time could not be refused the prisoner to obtain such evidence, in any case the least plausible. It would not be a sufficient answer that the question of guilt had already been decided, and that the weight of character could only apply to punishment. The award of punishment must be held to be of momentous consequence to the prisoner, but in many cases the question of character

General charac-
ter enquired
into by court
after finding.

Prisoner may
cross-examine
witnesses to
character,

and produce
evidence to
refute their
testimony.

(4) *R. v. Rowton*, Taylor, 361. The question "whether, when a witness, having given a prisoner a good character, any evidence was admissible to contradict it," came before the whole bench of judges, and on the 28th January, 1865, was affirmed by all (fifteen) of them.

(5) *Q.R. App. A.p.8*; see before, § 633-5.

may be of much more importance. If the possibility of unfair or prejudiced testimony be admitted (and this possibility cannot be rejected in a court of justice), there can be no question as to the necessity of affording the prisoner every opportunity of rebutting the testimony elicited on an inquiry into character.

Prosecutor cannot examine as to general habits, to show that the prisoner has a general disposition to commit offence charged.

827. On a court martial, as in a court of civil judicature, a *prosecutor* is not permitted, in any circumstances, to examine as to *general habits*, in order to show that the prisoner has a *general* disposition to commit the same kind of offence as that charged against him; (6) but he may prove that the prisoner expressed his intention of committing the particular crime in issue.

Character not connected with charge, cannot weigh against direct evidence of the fact.

When one of the elements upon which the court founds their opinion.

Character, when bearing on the charge;

on a charge of murder;

on a charge of theft;

on a charge implicating courage.

828. Evidence of general good character cannot avail the prisoner against evidence of the fact; but where "some reasonable doubt exists as to his guilt," (7) it may tend to strengthen a presumption of innocence; and where intention is a principal ingredient in the offence, or where presumptive proof only is adduced, evidence as to character, *bearing on the charge*, may be highly important, and serve to explain the prisoner's conduct. On a trial for treason, Lord Kenyon observed: "An affectionate and warm evidence of character, when collected together, should make a strong impression in favour of a prisoner; and when those who give such a character in evidence are entitled to credit, their testimony should have great weight with the jury." (8) On a charge of murder, where malice is the essence of the crime, expressions of good will and acts of kindness by the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards him, and leading to the conclusion that his intention could not have been that imputed by the charge. (9) On a charge of theft, character for honesty may be entitled to great weight. So also on a charge implicating the courage of a soldier, character for bravery and resolution might be of vast importance; but it would be manifestly absurd and irrelevant on a charge of theft, to allow character for bravery to weigh in the scale of proof; or, on a charge of cowardice, to be biassed by a character of honesty. General character, un-

(6) 1 Phillips, 508; see § 817.

(7) Taylor, 360-1.

(8) *Rex v. Tholwall*, O.B. 1794.

(9) 1 Phillips, 507.

connected with the charge, though it may not weigh with the court, except in awarding punishment in discretionary cases, may most essentially serve the prisoner, by influencing the superior with whom it rests to mitigate or remit the sentence.

829. *Secondly*.—That the point in issue is to be proved by the party who asserts the affirmative, is a rule of evidence arising from the difficulty, in many cases the impossibility of proving a negative; and because, when not impossible, the negative does not admit of the direct and simple proof of which the affirmative is capable. (1)

The onus probandi or burden of proof lies on the party whose case depends on the truth of the fact.

830. Hence the prosecutor must give evidence of the commission of the crime, or of facts from which the court may reasonably infer that it has been committed; and the prisoner must prove any facts from which he wishes the court to infer his innocence. The party wishing to prove a document by secondary evidence, must prove that it cannot be forthcoming. Where the charge is a culpable omission or breach of duty, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice not to presume that a person has acted illegally till the contrary is proved; (2) but the proof of possession of stolen goods, soon after the theft, shifts the necessity of explaining his having them to the prisoner. On a charge of absence without leave, the prisoner must prove any cause which rendered it unavoidable, or that, in fact, he had got leave; and so in like cases it will be seen that the burden of proof rests with him who has to support his case by the proof of a fact, in every instance where it must be supposed to be within his knowledge.

The burden of proving the charge rests on the prosecutor.

Prosecutor charging neglect of duty must prove it.

831. *Thirdly*.—That it is sufficient to prove the substance of the issue, is a rule in law on which courts martial are continually required to act. A due consideration of the statutory provisions hereafter quoted, [§ 832, 845-8] and of the following examples, may assist in forming a correct conclusion, in other cases where this principle is involved. Resort has been had to precedents from courts of civil judicature; because it may be supposed that the soundness of the law, involved in the custom or decision, is not so liable

The evidence must correspond with the allegations in the charge, but the substance of the charge only need be proved.

(1) Taylor, 272.

(2) 1 Phillips, 553.

to be questioned, as in the case of decisions of courts martial.

Offenders indicted for offences may be found guilty of an attempt to commit the same, and are liable to the same consequences as if charged with and convicted of the attempt only.

832. The following section of Lord Campbell's act is given at length, as it directly affects the proceedings of general courts martial for trial of civil offences, and the principle is applicable in other cases: "Whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: For remedy thereof be it enacted, That if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." (3)

No person so tried to be afterwards prosecuted for the same.

Examples, in actions of slander or disrespect, part of words charged may establish the charge;

833. In actions for slander, the courts used to hold that the plaintiff was bound to prove the words precisely as laid: but it is now settled, that it will be sufficient if the plaintiff prove some material part of the words alleged on the record. If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them. (4) The principle is obviously applicable where disrespectful or insubordinate language is the subject of a military charge.

on a charge of burglary, or

stealing may be found

834. On an indictment for burglary and stealing, if the prosecutor establish his case with the exception of proving that the breaking and entering was in the night, the prisoner may be convicted of housebreaking; if no breaking be proved, he may be found guilty of stealing, and so on. (5)

(3) 14 & 15 Vict. c. 100, s. 9.

(4) 1 Phillips, 560. Taylor, 228.

(5) Taylor, 257.

835. On the trial of a prisoner for murder, he may be found guilty of manslaughter only; for the principal matter is the killing, and the malice is only matter of aggravation. (6)

on a charge of murder, manslaughter may be found;

836. If the indictment charges that *A* gave the mortal blow, and that *B* and *C* were present, aiding and abetting, &c., and on the evidence it appears that *B* struck, and that *A* and *C* were present, aiding, &c., this is not a material variance; for the stroke is adjudged in law to be the stroke of every one of them, and is as much the act of the others as if they all three had held the weapon and had all together struck the deceased. The identity of the person supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law and in sound reason too, the stroke of all. They are all principals in law, and principals in deed.

where several aid and abet, the act of one is the act of all.

837. On courts martial, a prisoner charged with desertion may be found guilty of *absenting himself without leave*; for absence is the principal fact in issue, the motive and design being matter of aggravation. (1)

On a charge of desertion, absence without leave may be found;

838. On a charge of offering violence to a superior officer in the execution of his office, by discharging a loaded musket at him, the prisoner may be convicted of offering violence, and under the 105th, or 41st [§215*] article, punishment may be awarded although the evidence fail in establishing that the rank or authority of the superior officer was known to the offender, or although the capital offence under the mutiny act may not have been committed in consequence of the superior officer not having been in the execution of his office at the time. The principal matter is the *offered violence*, the rank and office of the person fired at are circumstances in aggravation.

on a charge of violence to superior, or to superior in execution of his office, violence only may be found;

839. On the trial of an officer charged with the conduct, on which is grounded the imputation of behaving in a scandalous manner, unbecoming the character of an officer

on a charge of scandalous conduct, imputation may be thrown out;—if facts be found, amounting to a substantive military crime, punishment may follow;

(6) 1 Phillips, 563. Taylor, 267. See general court martial arising out of a duel at Corfu, in which Lieutenant Scobell, H.P., Unattached, was killed. The surviving principal and the seconds were charged with *wilful murder*, of which they were acquitted,

but found guilty of *manslaughter*, and sentenced to be imprisoned—the principal and his second for four years, the second for the deceased for six months, G.O. 536.

(1) See a provision to this effect in the 43rd article of war [§182 n].

and a gentleman, the court may absolve the prisoner of the degree of guilt charged, and negative the imputation, either wholly or in part ; but if the court find all or some of the facts proved, and if they amount to a disorder or neglect to the prejudice of good order and military discipline, the court may at their discretion award cashiering or other punishment proportioned to the military offence, and *not* necessarily cashiering, which is prescribed positively as the penalty under the seventy-ninth article of war. (2) Mr. Samuel, in his elaborate but sometimes unmilitary work, has failed to remark this distinction in the case at the Cape, instanced by McArthur ; and also in that of Captain Gibbs, at Futtighur in 1814. (3) The case at the Cape is thus given by McArthur : At a general court martial at the Cape of Good Hope, in May 1801, an officer was charged with "scandalous, infamous conduct, unbecoming the character of an officer and a gentleman, in having sent a charge of six hundred pounds, or thereabouts, to Sir George Younge for a horse which the said officer had declared to be a present from him to Sir George, when governor of the colony of the Cape of Good Hope ;" concerning which charge the court martial made a distinction ; they acquitted the officer of

which the court then awards at its discretion ;

contrary opinion remarked on.

Case at the Cape.

Charge.

Opinion of court ;

(2) It is not an uncommon, though a most mistaken impression that—in cases where an officer is either brought to trial on the charge and found guilty of "*conduct unbecoming the character of an officer and a gentleman* ;" or else charged with "*SCANDALOUS conduct unbecoming the character of an officer and a gentleman*," but acquitted of so much of the charge as designates his unbecoming conduct as *scandalous*—the court is bound, although the offence as found *does not* fall under the 83rd article, nevertheless, to award cashiering.

There can be no question but that courts martial may, and very frequently do, award this, the extreme punishment, under the 105th article, when they are of opinion that cashiering is called for by the nature and degree of the particular offence ; but it altogether depends on the court either to sentence the offender to be cashiered or to suffer any of the *other* and less severe punishments, ranging from dismissal to reprimand, which they may award at their discretion.

The subjoined extract from a decision of King George the Fourth may serve to put this point in its proper light. A general court martial having found an officer guilty of "conduct unbecoming the character of an officer and a gentleman," sentenced him "to be cashiered." They then recommended him in the most feeling terms to the gracious consideration of His Majesty, prefacing their appeal by a statement "that they had awarded the specific punishment which the articles of war prescribe."

"The King has been pleased to approve and confirm the *finding* and *sentence* of the court : but in consideration of the long services, &c. . . . and the strong recommendation of the court in "the prisoner's "favour, His Majesty has been graciously pleased to remit the sentence ; which appeared, moreover, to have been adjudged by the court under an *erroneous impression*, that it was *bound by law* to pass it."—G.O. Horse Guards, 6th Nov. 1823.

(3) Samuel, 648-651.

scandalous, infamous behaviour, but considered his conduct, nevertheless, as unbecoming the character of an officer and a gentleman, for which they adjudged him to be suspended from rank and pay for the space of six calendar months. The proceedings having been laid before His Majesty, the judge advocate general signified to Lieutenant General Dundas, the commander in chief at the Cape, that His Majesty, laying out of the case any question touching either the right or delicacy of the officer's claim to a compensation for the horse, concerning which the difference had arisen, points not within the cognizance of a court martial, considered the adjudication as irregular, inasmuch as the court had acquitted him of the only imputation which could bring the business as a charge before them, namely, of any scandalous or infamous behaviour in the transaction: His Majesty could not, therefore, approve the sentence; at the same time it was signified, that His Majesty was graciously disposed to attribute the error to the nice feelings of the officers who composed the court martial, which had urged them to mark their dislike of a conduct which appeared to them not decorous. (4)

remarks of His Majesty.

840. The other case referred to by Mr. Samuel is that of Captain J. Gibbs, 16th Native Infantry: He was arraigned in the year 1814, at Futtyghur, for scandalous, infamous conduct, in having endeavoured, at Rewarrie, on or about the 26th October, 1813, to prevail on the wife of Major E. P. Wilson to quit her husband's protection, and fly to his, at a time when it was known that Major Wilson was very dangerously ill. The court acquitted the prisoner of another charge, and on this charge found him guilty of having endeavoured to prevail on the wife of Major E. P. Wilson to quit his protection, under the circumstances charged: but acquitted him of scandalous and infamous conduct, unbecoming an officer and a gentleman. The Marquis of Hastings, then governor general and commander in chief in India, in remarking on the circumstances of the sentence, observed in his general order to the Indian army: "That the court, in declaring the immoral act, proved against Captain Gibbs, did not come within the description of scandalous, infamous, and unbecoming the character of

Case of Captain Gibbs;

second charge

opinion of court;

remarks of the commander in chief.

an officer and a gentleman, divested itself of all power (in the opinion of the commander in chief) to award punishment, because the act cannot stand within military cognizance, but inasmuch as it may be considered to come under the above specific definition, the commander in chief must, therefore, regard the court as having returned a verdict of acquittal generally; in this view of the case, his lordship directs that Captain Gibbs shall return to his duty." (5)

- Inference from the remarks of His Majesty and the Marquis of Hastings :

841. Mr. Samuel might have noticed that the declaration of His Majesty's sentiments on the trial at the Cape, as expressed by the judge advocate general, points out most clearly that the court acquitted the prisoner "of the *only imputation* which *could bring* the business as a charge before them." An officer's sending an improper charge for a horse, taken abstractedly, could in nowise affect military discipline, and excepting as it might implicate the personal character of an officer, in a degree amounting to "scandalous conduct," no offence under the articles of war could be charged; since there is not any provision in the articles for the cognizance of unofficerlike and ungentlemanlike conduct, (divested of a tendency to affect good order and military discipline,) in any degree less than that involving scandal. So also, the order as to Captain Gibbs very clearly specifies, that the court divested itself of all power to award punishment, *because the act* (as found by them) *could not stand* within military cognizance. If then the court had been of opinion that the act *could* have *stood* within military cognizance, when separated from the imputations built upon it by the charge, the court would *not* have divested itself of all power to award punishment; and, therefore, had the charge been for conduct directly to the prejudice of military discipline, Captain Gibbs might have been lawfully punished on proof of the facts, apart from the special imputation charged. In support of this opinion, many cases might be quoted, but the following is given, because the sentence was confirmed by the sovereign; and in it the accused is expressly acquitted of scandalous conduct, unbecoming the character of an officer and a gentleman, with which he had been pointedly and exclusively charged (so far as the imputation built on the facts extended); and yet, being found guilty of com-

unmilitary conduct may be visited by punishment,

though charged as, but not amounting to, scandalous, infamous conduct.

mitting certain acts, (set forth as the grounds of the imputation charged,) evidently tending to the prejudice of good order and military discipline, the prisoner is punished accordingly.

842. At a general court martial held at Lisbon, on the 19th June, 1810, and continued by adjournments to the 21st of the same month, Lieutenant Thomas Dunkin, 4th Dragoons, was arraigned for "*scandalous and infamous* conduct, unbecoming the character of an officer and a gentleman, while in command of a detachment of the 4th Dragoons, in the Anacreon transport, on the passage from Portsmouth to Lisbon, *by* making use of highly improper language to, and striking, Hospital Mate Daniel Maguin, an officer under his command, on or about the 7th March, 1810." The court "was of opinion that he was guilty of the first part of the first charge preferred against him, in as far as making use of highly improper language to, and striking, Hospital Mate Maguin, an officer under his command, on or about the 7th of March, 1810, being in breach of the articles of war, and by virtue thereof sentenced him, the prisoner, Lieutenant Thomas Dunkin, of the 4th Dragoons, to be suspended from rank and pay for the space of six calendar months; but the court, in consideration of the grossly insulting language made use of by Hospital Mate Maguin to the prisoner, *acquitted* him of *scandalous, infamous conduct, unbecoming the character of an officer and a gentleman.*" The King was "pleased to confirm the opinion and sentence of the court; but, in consideration of all the circumstances of the prisoner's conduct, as they appear on the face of the proceedings, His Majesty was pleased to command that it should be intimated to Lieutenant Dunkin, that His Majesty had no further occasion for his service." (6)

Case of Lieut.
Thomas Dunkin;

charge;

opinion;

sentence; .

confirmation.

843-4. A soldier charged with disgraceful conduct may, in like manner, be acquitted of the imputation; and if found guilty of the facts charged, they being to the prejudice of good order and military discipline, may be punished according to the nature and degree of the offence.

On a charge of
disgraceful con-
duct imputation
thrown out, facts
found.

845. With respect to variances, and as connected with the maxim now under consideration, it may be useful again to refer to Lord Campbell's Criminal Justice Improvement Act,

VARIANCES.

Lord Campbell's
Act lays down

(6) G.O.186. On this subject, see also § 410-11.

14 & 15 Vict.
c. 100.

(14 & 15 Vict. c. 100). Many important provisions directly apply to the proceedings of courts martial, when employed to dispense the criminal law, although others, in accordance with the custom of the service, can only be brought to bear by the intervention of the superior authority.

the principle of
relaxing the
technical strict-
ness of former
practice.

846. It premises that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case:" that "such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence:" and that "a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the *person on trial cannot have been prejudiced in his defence.*"

The court may
amend certain
variances;

847. It enacts (*sec. 1*) that "whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the

name of place,

or person,

or thing,

or owner,

case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred."

14 and 15 Vict. c. 100.
not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial.

848. The twelfth section provides that "If upon the trial of any person for misdemeanor, it shall appear that the facts given in evidence amount to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor," and thus puts an end to a legal subtilty, which had led to a failure of justice; as, for example, where a man was tried for an assault on a woman, and it turned out that he had committed a rape, it was held that he was to be acquitted, because the misdemeanor had *merged* in the felony.

The doctrine of merger put an end to.

849. It depends on the general rule, "*It is sufficient to prove the substance of the issue,*" that it is not held to be invariably necessary to prove the time precisely as laid, except in the very few cases where the particular day or hour may form an ingredient of the offence itself. (7) This is the constant course of proceeding in criminal prosecutions before courts of ordinary jurisdiction, from the highest offence to the lowest:—In high treason, evidence may be given of an overt act, either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form; (8)—nor is

Variance in time.

(7) The 7 Geo. 3, c. 64, s. 20, declares that no judgment or any indictment or information, for any felony or misdemeanor, shall be stayed or reversed, for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating

the time *imperfectly*; nor for stating the offence to have been committed on a day *subsequent* to the finding of the indictment or exhibiting the information; or on an *impossible* day; or on a day that never happened.

(8) 1 Phillips, 600.

greater strictness required in the proof of charges before a court martial.

Adverted to in finding.

850. On the trial of Lieutenant Colonel Alen, the court in their sentence made the following remark, which, as part of the proceedings, was approved by His Majesty: "The court have not taken into consideration the circumstance of the order of the 30th January," (the order, which the lieutenant colonel was charged with disobeying), "having been inserted in the *third charge*, instead of the 31st of that month, the mistake appearing to have been merely a clerical one." (9)

Specific finding

851. In the case of a soldier, who was tried for having deserted on the 19th October, 1833, when in fact he had deserted on the 19th October of the preceding year, but was still illegally absent on the date mentioned in the charge, the court was recommended by the judge advocate general (1) to come to a specific finding, stating the facts which appeared in evidence as above detailed, and to find the prisoner guilty of the charge, with the exception of so much of it as imported that he deserted on or about the particular date mentioned.

necessary where date or place has been incorrectly stated.

852. It would appear that this specific finding is in strictness essential to the execution of the sentence, and should in no case be omitted when a date has been inaccurately stated. (2)

Variance in place, previous custom relative to, affected by existing provision of mutiny act.

853. An alteration in the mutiny act of 1834, which has been already adverted to [§10], considerably affects the practice of courts martial, as to evidence of place. The jurisdiction of courts martial is extended without limitation as to place, and a mistake as to place, unless the place be material, will not affect the proceedings; the acts of the prisoner, wherever committed, being liable to be given in evidence.

(9) G.O.425.

(1) Mr. Robert Grant.—9th January, 1834.

(2) The judge advocate general remarked upon the case of a soldier of the Scots Fusilier Guards, who was proved (*February*, 1833) to have committed the offence laid to his charge, but not upon the day specified: "It was perfectly competent to the court to find the prisoner guilty under the

charge so framed, although the offence was proved to have occurred on a different day, but, in such case, it was in strictness the duty of the court to specify in their finding on what day the offence took place." As the court in this instance confined itself to stating the offence had *not* occurred, on the day mentioned, the judge advocate general recommended the sentence should not be confirmed.

854. Where the offence has been incorrectly charged as to place, the court may, as in the case of time, correct this variance by a specific finding. A prisoner was charged with deserting from Aldershot, and the court found him guilty of the charge, "except that he deserted from Winchester and not from Aldershot."

Variance as to place corrected by verdict.

855. The same principle applies to allegations of number and quantity, where the proof *pro tanto* supports the claim or charge; as, for example, a prisoner, charged with stealing ten shillings, may be convicted of stealing five. (3)

Variance as to number and quantity.

856. *Fourthly*.—The general rule, that "Hearsay is not evidence," arises from the admitted principle of English law, that, with few exceptions, every fact should be proved in solemn form of law [§443, 940] by the testimony of a witness speaking from his personal knowledge, and in the presence of the opposite party, so that he may have an opportunity of cross-questioning the witness as to his means of knowledge, his accuracy of observation, the strength of his recollection, and his disposition to speak the truth.

Hearsay or second-hand evidence not receivable,

1. because the second person not on oath.

2. because he was not subject to cross-examination.

857. Hearsay, in its legal sense, is used with reference both to that which is written and that which is spoken, being applied to that second-hand kind of evidence which does not depend solely on the credibility of the witness himself, speaking from his own knowledge, but depends on the information he has derived from others. (4)

"Hearsay," technical meaning of, as here used.

This rule excludes derivative or second-hand proofs.

858. So far is the general rule carried, that it is held to exclude any verbal or written narrative of facts received from some other person, even if that person were a witness giving his evidence on oath, and though such statement "purports to be the narrative of an eye-witness of a transaction, and that witness the only one, and he since dead." (5) But when a witness in the course of stating what has come under the cognizance of his own senses, relative to a matter in dispute, states the language of others which he has heard, or produces papers, which he identifies as being written by certain persons, his evidence may *sometimes* be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute, may be drawn. In such cases, the words or writings are received in evidence

Hearsay is excluded, in cases where no other account can possibly be obtained.

but does not exclude evidence of words or writings, considered as transactions or grounds of inference;

and not adduced to prove their subject-matter.

(3) Starkie, 627.

(4) 1 Phillips, 143. Taylor, 521, 524.

(5) 1 Phillips, 167. Taylor, 522.

—not in proof of their own truth, but—in proof of their having been spoken or written; in fact, as being transactions, concerning which enquiry may be instituted, whether they have taken place or not. (6)

Exceptions :

Dying declarations of persons conscious of being in a dying state,

859. Apart from the reception of documentary evidence, and of confessions by prisoners, which will be considered hereafter, [§992] there are several deviations from this rule. The most essential is in the admission of the dying declaration of a person, (though not made in the presence of the accused, nor subject to cross-examination,) who, having received a mortal injury, relates the cause of his death or other material circumstance, but there must be actual danger of death, and a full apprehension, at the time, of such danger, in order to render such declarations admissible after the death. (7)

received against a prisoner charged with their death ;

860. The mind is then presumed to be under as great a religious obligation to disclose the truth as is created by the administration of an oath ; but it is held that such declarations are only admissible “where the death of the person, who made the declaration, is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration.” (8) The declarations of the deceased in favour of a party charged with his death are admissible equally as where they operate against him. (9) Statements made by deceased persons as to the state of their health, or the nature of their sufferings, may be admitted, as was done on the trial of Palmer for the murder of Cook in 1856, although not coming within the rule as to dying declarations.

and equally when favourable to him.

Hearsay admissible when verbal acts indicate a present purpose and intention, or are part of a transaction, or the *res gestæ*.

861. Words and writings are admitted in evidence if they are connected with, or serve to explain, some act, when its nature and object, or the motives, form part of the subject of enquiry. When actions are attributable to, or result from, deliberation, actions are to be explained by the exist-

(6) 1 Phillips, 164—8. Taylor, 526—9.
(7) By Lord Denman, C.J., 1 Phillips, 244.

(8) 1 Phillips, 241. As the declarations of a dying man are admitted on a supposition that he believes himself to be on the confines of a future world, and has no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice—it neces-

sarily follows, that the party against whom they are produced in evidence may enter into the particulars of his state of mind, and of his behaviour in his last moments; or may be allowed to show, that the deceased was not of such a character as was likely to be impressed by a religious sense of approaching death.

(9) 1 Phillips, 242.

ing state of the mind. (10) A prisoner's conversation connected, though by implication or collaterally only, with the subject of enquiry, may be received as indicating the bias or inclination of his mind ; (1) or as having led to an act. (2) Expressions sometimes afford the only evidence by which to judge of intention and design; and intention and design, forming the very gist or essence of some crimes, original evidence of words or writings, or *hearsay* in its larger and more ordinary signification, is most important, and the necessity of admitting it in these cases must be evident.

Conversation of prisoner connected with subject of enquiry.

862. The declaration of a person robbed, or of a woman ravished, as to the fact, made immediately afterwards, may be received as confirmatory evidence, though the *particulars* of such statements cannot be enquired into, (3) unless it be in cross-examination by the prisoner. (4)

Complaint in cases of rape, or robbery.

863. What a witness has been heard to say or has written at another time may be given in evidence, in certain circumstances, which will be adverted to with reference to the discrediting of witnesses. [§982]

Previous statements by witnesses.

864. What a third person has said, or written, is admissible in many cases, as amounting to an act done by him, or as showing his knowledge, or as evidence of his conduct. If, for instance, it is material to enquire whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of the order ; or, where it is material to enquire whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge, as what he has done. So, where it is relevant and material to enquire into the conduct of rioters, or mutineers, or other confederates in an unlawful enterprise, what has been said or written by any of the party, in furtherance of their common intention, must manifestly be admissible as evidence of design and intention against each of them, if there be sufficient evidence of concert and connection. (5)

Conversation or writing of third person.

Writings or words of confederates receivable in like manner as acts may be.

865. *Fifthly*.—The best evidence the nature of the case will admit of, must be produced, if it be possible to be had.

Best attainable evidence must be adduced.

(10) 1 Phillips, 162.
(1) Evidence may always be given of what third persons have said in the prisoner's hearing, because his behaviour on hearing it is evidence for

or against himself.
(2) Lt.-Col. Crawley's Trial, 338.
(3) 1 Phillips, 161.
(4) Taylor, 532.
(5) 1 Phillips, 157-9. See § 821-4.

Where not to
be had,
secondary is
admitted;

but such
secondary
evidence must
be legal evidence.

Production of
secondary
evidence when
better can be
had, raises a
suspicion of
fraud against
the party
producing it.

Distinction
between best
possible evidence
and strongest
possible assur-
ance.

The rule may be illustrated by the examples of the official record being the best proof of the proceedings of a court of justice, and a written document being the best evidence of its own contents. Although in cases where the best possible evidence cannot, by any exertion, be obtained, the law may relax its demand, yet it must be remembered that it cannot forego legal proof. The best *legal* evidence not being attainable, and the fact that it is unattainable having been proved to the satisfaction of the court, then, and then only, is the next best *legal* evidence admitted. The law does not exclude any *evidence*, which is the *best* that can be produced; but unauthenticated copies and hearsay, (with the exceptions elsewhere mentioned,) are in no circumstances to be admitted.

866. The meaning of this rule is, not that the fullest possible evidence of any fact is absolutely and at all times required, but that no evidence shall be admitted, which leaves grounds for supposing that other and better evidence remains behind in the possession or power of the party: for the very production of such secondary evidence tends to raise a presumption of some secret or sinister motive for withholding the better and more satisfactory evidence, and leads to the inference that the evidence, if produced, would have led to the detection of some concealed falsehood.

867. The law excludes secondary evidence for the reasons above noticed, but it does not require the strongest possible assurance; in other words, it does not require the fullest proof the case will admit of, nor a repetition of evidence beyond that which is sufficient to establish the fact. For instance, it is not necessary, in order to prove handwriting, to call the writer himself; nor if a whole regiment should be present at some overt act of mutiny or insubordination, as the striking a commanding officer in front of his regiment, will the law require the production of the whole of the persons present; for if one only were produced, and if, from the situation he was in at the moment of the occurrence, he had as favourable an opportunity of observing what took place as any person present, the evidence afforded by such one witness would be complete, and not inferior in kind to any that could be produced. In such case, therefore, the best possible evidence (best in nature) would have been produced, though not the strongest possible assurance.

868. Sufficient evidence is that which the law requires; not an accumulation of identical testimony; hence it is, that the law of England admits, as sufficient, the testimony of one *credible* witness, (1) with the following exceptions. In trials for perjury one witness alone is not sufficient, without some material and independent corroborative evidence, in proof of the falsity of the statement as to which the perjury is charged, because otherwise there would be only one oath against another, (2) and this rule equally applies to trials for perjury before courts martial. The other exceptions do not arise from the nature of the case, and were created by positive enactment in certain cases under the treason-felony act, (3) and certain cases of high treason and misprision of treason. (4) In the case of Atwood and Robins, at the summer assizes at Bridgewater, 1787, the judges of England were unanimously of opinion, and it has since been held as a rule, (modified in practice by certain cautions) (5) that the evidence of an accomplice *alone* is admissible; and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction on such testimony *alone* is strictly legal. (6)

Number of witnesses necessary for proof of fact.

Single witness sufficient when more are not enjoined:

but it is the prudent practice to require an accomplice to be corroborated as to some material fact.

869. In conformity with English law as above cited, courts martial are accustomed to receive as sufficient, the evidence of one credible witness to a fact not admitting further proof: nor is there any exception to this practice when such single witness is the prosecutor or complainant. The prosecutor [§472(2)] before courts martial, as is also the case before courts of ordinary criminal judicature, being a *competent* witness, his *credibility* only is liable to be impeached, and must be judged from attendant circumstances. In cases therefore where the privacy of the offence has excluded the possibility of further proof, and where no facts have been proved, tending to place in doubt the credibility of the prosecutor, courts martial have admitted, as sufficient for conviction, the testimony of the prosecutor alone. At a general court martial held at Kingston, Upper Canada, on

Evidence of prosecutor sufficient in certain cases:

(1) The general rule of the law of Scotland is to require two witnesses for the proof of a fact; so also the Roman law, the maxim running *Unius responsio non omnino audiat*. But courts martial, in resorting to courts of civil judicature for precedents, are re-stricted to the common law courts of England.—*Author*, 1830.

(2) Taylor, 863-9.

(3) 11 & 12 Vict. c. 12, s. 4.

(4) 7 Will. 3, c. 3, ss. 2, 4.

(5) See hereafter, § 917.

(6) 1 Phillips, 93-103.

case of
Paymaster
Francis :

charge.

Evidence of
prosecutor
sufficient in
certain cases :

Case of Lieut.
Cameron :

charge :

finding :

the 25th and 26th May, 1814, Paymaster Robert Francis, 103rd Regiment, was arraigned, found guilty, and sentenced *to be discharged*, upon the undermentioned charge, which admitted the evidence of the prosecutor alone, notwithstanding the prisoner pleaded not guilty to the charge, and strenuously denied the facts set forth in it: "Scandalous and infamous conduct, unbecoming the character of an officer and a gentleman, in taking an opportunity when, from the *absence of a third person*, he appeared to consider himself safe from legal prosecution, to use language highly disrespectful and reproachful to Colonel Scott, his commanding officer, and to throw out disgraceful and infamous insinuations to the prejudice of his character, such conduct being also highly subversive of good order and military discipline, taking place at Kingston, Upper Canada, on the morning of the 19th May, 1814." (1)

870. The remarks by the Prince Regent in a case, about the time of Paymaster Francis' trial, must be entirely conclusive as to the legal sufficiency, for conviction by courts martial, of one credible witness, (and that one the prosecutor), except in cases *specially* requiring two. Lieutenant John Cameron, 4th Garrison Battalion, was arraigned at Bermuda, in June, 1814: "1st. For conduct highly insubordinate and totally subversive of good order and military discipline, on the evening of the 20th May last, in a house rented for officers' barracks, by laying one hand upon the hilt of his sword, and striking Captain Hart a blow with the other; and afterwards, when ordered in arrest, for making a violent blow at the said Captain Hart, in direct breach of the articles of war. 2nd. For leaving the above barracks on the same evening, after being in his room in arrest by order of Captain Hart, and for having, on his return, used insulting and contemptuous language to, and provoking gestures at, the said Captain Hart, in breach of the articles of war, and subversive of good order and military discipline." Upon which charges the court came to the following opinion: "With respect to the first charge, that from want of corroborating circumstances the charge is not proved, and, therefore, doth acquit the prisoner." Upon the second: "That walking in the garden belonging to the barracks was

not breaking his arrest, and with respect to the latter part of the charge, the court, for the reasons assigned in the first charge, (*sic*) doth acquit the prisoner." The court was re-assembled by the major general commanding, to revise their opinion, but adhered to that first given. The proceedings, being submitted to the Prince Regent, were confirmed in the following terms: "Under all the circumstances of the case, the Prince Regent has been pleased, in the name and on the behalf of His Majesty, to confirm the sentence of the court: but as the court must be presumed to have founded their sentence of acquittal upon the belief that Captain Hart's evidence was given under the impression of irritation, and an exaggerated description of what had occurred, there being *no doubt of the legal sufficiency of one witness to justify conviction, if the evidence of such witness be entitled to full credit*; and viewing all the circumstances connected with the conduct of the prisoner, Lieutenant Cameron, the Prince Regent has been pleased to consider him an improper person to remain in the 4th Garrison Battalion, and to command that he shall forthwith be placed upon half-pay." (2)

remarks of the
Prince Regent.

871. It has been well remarked by Mr. Phillips, on the subject of a single witness, that in deciding upon the effect of evidence, the question is, not by how many witnesses a fact may have been proved, but whether it has been proved satisfactorily, and so as to convince the understanding. The number of witnesses is not more conclusive on matters of proof, than a number of arguments on a subject of reasoning. If the law were in every case peremptorily to require two witnesses, this would by no means ensure the discovery of truth; but it would inevitably obstruct its disclosure, wherever the facts were known only to a single witness; and thus secret crimes might escape with impunity. Abstractedly speaking, there cannot be any reason for suspecting the evidence of a witness, because he stands alone. The evidence of a single witness may be so clear, so full, so impartial, so free from all suspicion and bias, as to produce in every mind, even in the most scrupulous, the strongest and deepest conviction. On the other hand, witness may crowd after witness, all making the same assertions, yet none be worthy

Evidence of
single witness.

of credit. In short, it is the character of witnesses, and the character of their evidence that ought to prevail; not their number.

Exceptions :

sufficient to
prove that the
accused acted
in the charac-
ter set forth ;

or that the
authority
originating an
order acted in
the capacity :

or, where doubt
as to attestation,
that soldier had
served six
months.

Evidence
according to
the effect pro-
duced on the
judgment,
is Direct, or

Presumptive.

872. To the rule which requires that *the best evidence shall be produced*, there are exceptions which will be noticed in speaking of written evidence. Also it is sufficient to prove that the accused acted in the character alleged in the charge, without bringing direct evidence of his appointment or engagement. Thus, on a charge of neglect of any special duties attaching to a particular post or employment, it would be sufficient to show that the accused had acted in the character set forth, without putting in proof the commission or order under which he acted ; this has been ruled on an information in a common law court, against a military officer, for making false returns. (3) So also on the trial of an officer or soldier for disobedience of orders given by a particular person, specially authorized by his office, it is sufficient to show that the officer giving the order had previously, in the knowledge of the accused, acted in the capacity alleged. On a charge of desertion or other offence against military discipline, it is sufficient to prove that the accused had done duty or received pay, without proving the commission or attestation. (4)

873. The proof of a fact may be either direct and positive, or circumstantial and presumptive. Positive proof arises from the direct evidence of witnesses who speak from their own actual and personal knowledge, which if true establishes or negatives the fact immediately in question. Presumptive proof arises from circumstantial evidence, that is, direct evidence of collateral facts, in themselves not immediately in question, but presumed to have a connection near or remote with the fact in controversy, and, if true, indirectly to prove or disprove it, or to be a reason for or against its probability. Presumptive proof of a principal fact is, there-

(3) Phillips, 381. 1 Taylor, 708. Rex v. Gardner, 2 Campbell, 513.

(4) In the case of a soldier the mutiny act specially provides that no person, who for six months has received pay and been borne on the strength and pay list of any regiment or corps, or depôt or battalion of a regiment or corps (of which the last

quarterly pay list, if produced, is declared to be evidence), is entitled to claim his discharge on the ground of error or illegality in his enlistment or attestation, or on any other ground whatsoever, but, on the contrary, shall be deemed to have been duly enlisted and attested.—M.A.59.

fore, an inference or deduction from positive evidence of a concurrence of subordinate circumstances, which, if unexplained, common sense points out as sufficient evidence of the existence or non-existence of such principal fact.

874. Beccaria has well pointed out that when all the proofs of a fact are dependent on one, the number of proofs neither increase nor diminish the probability of the fact; for the value of the whole is reduced to the value of that on which they depend; and if this fail, they all fall to the ground. But when the proofs are distinct and independent of each other, the probability of the fact increases in proportion to the number of proofs; for the falsehood of one does not affect the other. (5)

Several proofs dependent on a particular proof, derive their weight from it alone;

875. It has almost passed into a proverb that "Circumstances cannot lie;" but, as has been very pointedly remarked by Mr. Taylor, if "circumstances" mean—and they can have no other meaning—those facts which lead to the inference of the fact in issue, they not only can, but often do lie; or, in other words, the conclusion deduced from them is often false. He instances the case of St. Paul after his shipwreck. When the viper fastened on his hand the barbarians said among themselves, "No doubt this man is a murderer;" but when they saw no harm came to him "they changed their minds, and said he was a god." Here both conclusions were alike false. Besides, before a court, the very "circumstances" must be proved, like direct facts, by witnesses who are equally capable with others of deceiving, or being deceived. (6).

No conclusion drawn from circumstantial evidence can amount to absolute certainty.

Acts xxviii. 2-5.

876. A concurrence of well attested incidents may nevertheless, in some cases, carry as clear, or even a more clear, conviction to the mind than positive testimony. Presumptive evidence ought, however, in all cases to be admitted cautiously; and, when received as proof of guilt, should be such as to exclude a rational probability of innocence.

Presumptive evidence should be admitted cautiously.

877. But besides presumptions of fact, which suppose in each case an independent act of reasoning, there are certain presumptions of law, which will stand good until the contrary is proved. The law presumes that every man is innocent, or rather deals with him as if the presumption were in his favour, until the contrary is proved; that a man may

Presumptions of law.

be induced to confess himself guilty when innocent, by the hope and promise of pardon, and the like.

Presumptive
proof of
the payment
of money :

878. A receipt for subsequent rent is presumptive proof that rent for a previous period for the same premises has been paid. (7) Proof of the settlement of a soldier's accounts, for a particular month, would, in the absence of contrary evidence, be presumptive proof that he had been settled with for any preceding month, since the orders of the army direct that a soldier should be settled with monthly. Proof of the existence of an order in an orderly book, it being shown that it is the duty of the party daily to inspect the same, is presumptive proof of notice or the delivery of an order ; but proof to the contrary is obviously admissible. Proof that a soldier belonged to a draft which embarked to join the service companies of a regiment abroad, and that he was apprehended after the transport had sailed, and at a distance from the port of embarkation, has been held to justify a conviction for desertion, the prisoner not offering any explanation of his absence.

of the exist-
ence of an
order ;
of desertion.

Presumption
of intention ;

879. The general presumption is in favour of innocence ; but as men commonly do not do unlawful acts with innocent intentions, the law presumes that a person intends whatever is the natural and probable consequence of his own actions ; and that—until the contrary is shown—every act which is unlawful is unlawfully intended. (8)

of malice ;

880. Where an act is done injurious to another, malice (that is, a purpose to injure) is *primâ facie* to be presumed in the person doing that act ; thus on a charge of murder, the law presumes malice from the act of killing, and throws upon the prisoner the burden of disproving the malice by justifying or extenuating the act. (9)

charge of
murder ;

on a charge
of wilfully
maiming.

881-8. On a charge for *disgraceful conduct in wilfully maiming or injuring with intent to render unfit for the service*, the intent must be collected from circumstances ; and, in default of other evidence, it may be presumed or inferred from the act of maiming or injuring. Examples might readily be multiplied, were it necessary ; but it will be evident, that in every case intention can be but matter of presumption, arising either from the facts stated in the

Intent always
inferred from
circumstances,
but cannot be
presumed to be
criminal where
the act is in
itself innocent.

(7) 1 Phillips, 492.

(8) 1 Phillips, 474. Taylor, 130.

(9) 1 Phillips, 474, 475. Taylor, 31.

charge, or from collateral facts appearing in evidence. But there is this distinction, as pointed out by Lord Mansfield, between the cases where a criminal intent must be proved and those where it may be presumed :—"Where an act, in itself *indifferent*, if done with a particular intent becomes criminal, then the intent must be proved and found ; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent." (10)

(10) R. v. Woodfall, Taylor, 131.

CHAPTER XX.

LEGAL PROVISION FOR ATTENDANCE OF WITNESSES AND PRODUCTION OF DOCUMENTS; AND AGAINST FALSE OATHS.

Attendance
of witnesses
enforced
by law,

but not
unless their
evidence is
required, in the
discretion of the
judge advocate,

subject to the
judgment of the
court.

Witnesses
duly sum-
moned and
not attending,
or withholding
evidence,
are liable to
attachment by
the civil courts,

must attend
unconditionally,

889. It is the duty of the judge advocate, or president, as the case may be, to summon the witnesses who may be required either on the part of the prosecution or the defence. But the mutiny act does not require the judge advocate to summon all witnesses whose names may be given to him, for otherwise the powers conferred by it might be used for purposes of vexation, or to defeat the ends of justice. He may call upon the parties to satisfy him that the testimony of the witnesses is material to the case, or is required or tends to prove the innocence of the prisoner, and summon them or not in his discretion before the assembly of the court. The trial may be prolonged, but the parties are not prejudiced, as they may make further application to the court, which since 1868 has been authorised to adjourn for the production of the desired evidence, if satisfied that it is "necessary to assist the course of justice." (1)

890. It is provided by the mutiny act that all witnesses, "as well civil or military," so duly summoned, "who shall not attend on such courts, or attending shall refuse to be sworn, or being sworn shall refuse to give evidence or not produce the documents under their power or control required to be produced by them, or to answer all such questions as the court shall legally demand of them," shall be liable to be attached in the courts of law "upon complaint made in like manner as if such witnesses, after having been duly summoned or subpoenaed, had neglected to attend upon a trial in any proceeding in the court in which complaint may be made." (2)

891. Formerly the clause ran *in any criminal proceeding*, but when the mutiny act was recast in 1829 the word

(1) Q.R.App.A.p.2. See § 534.

(2) M.A.13.

criminal was omitted: it may be inferred that this omission did not alter the intention of the act, the penalties, incurred by neglecting to attend courts martial still being such as arise from neglecting to attend a trial in *any*, and consequently, in a criminal proceeding. It is well known that in *criminal* proceedings, the demands of public justice supersede every consideration of private inconvenience, and witnesses are bound unconditionally to attend the trial upon which they may be summoned. They cannot lawfully refuse attendance on the ground of not having received or been tendered their expenses, (3) except where the process is served in one of the parts of the United Kingdom for the appearance of the witness in another of the parts; (4) it therefore follows, that in all cases (saving the exception just stated), witnesses failing to attend courts martial, being duly summoned, though their expenses in coming, attending, and returning, have not been tendered to them, are liable to be proceeded against by attachment.

subject to
attachment.

892. Military witnesses failing to attend or withholding evidence are moreover amenable to military law for conduct to the prejudice of good order and military discipline. The military offence does not merge in the civil misdemeanour in consequence of the provision in the mutiny act as to attachment.

Military
witnesses
failing to attend
punishable for
offence against
discipline.

893. Cases having arisen in which officers holding the appointments of governor and commander of the troops, and authorized by warrant from the sovereign to convene general courts martial, have declined to attend and give evidence on trials held under their authority, when duly summoned by the judge advocate for that purpose, the matter was referred to the proper authority, and Lord Hill was advised that officers so circumstanced are not privileged from giving evidence before a general court martial, and that being invested with the royal warrant, and being the persons who have convened the courts martial and who are to confirm or disapprove of the proceedings, they are not exempted from the duty of attending as witnesses when summoned, and of answering such questions as may be legally put to them. (5)

Governors or
commanders of
troops holding
warrants for
convening
courts martial

are not
exempted from
the duty of
attending as
witnesses
thereat;

(3) 2 Phillips, 441. Taylor, 1084.

(4) 45 Geo. 3, c. 92.

(5) Circular to Governors, &c.—
Horse Guards, 23rd Feb. 1837.

but are not
compellable to
answer ques-
tions objection-
able on the
score of public
policy,

894. The circular upon the above subject continues: "There are no doubt many questions, which might be put to other witnesses, which could not be put to governors and commanders of the troops, as they could not be compelled to disclose, nor ought they to be permitted to disclose, confidential official correspondence or correspondence touching the officers of their government, or to give any information which, on the ground of public policy, they are bound to withhold, but there is no rule of law which exempts altogether the governor or commander of the troops in a colony from giving evidence before a court martial or any court of justice."

although it
has not been
made appear
that their
evidence is
essential;

895. In the year 1854, the commander in chief in India, having been summoned as a witness for the defence on the trial of a subaltern in the 32nd Regiment "with deference demurred at the requisition so made upon him, until he had been furnished with the assurance of the court of its being their opinion that his attendance as a witness was essential to the cause of the prisoner." (6) In the following year a circular to commanders of the troops abroad informed them, with reference to the circular of the 23rd February, 1837, that a question having recently arisen "whether some distinct qualification may not be thought advisable to be attached to the instructions conveyed in the circular to the effect that in all cases the competency of the party so summoned to bear witness with reference to any one fact included in the charges should be ascertained by competent authority before the summons is admitted to be valid," which had been referred to the proper legal authority, that officer suggested the expediency of appending to the said circular the following paragraph, viz. "It is however to be observed that if any person, who is subject to military law, should cause the commander of the troops to be summoned to give evidence before a court martial, and it should manifestly appear that such person must have then well known that the evidence of such officer could not be needed for the purposes of justice, such person will thereby render himself liable to be arraigned before a court martial on a charge for conduct to the prejudice of good order and military discipline,"—and Lord Hardinge, concurring in this view of the case, desired that

which point
was expressly
raised,

and drew forth
a notification
of the liability
to trial by
courts martial
of persons
vexatiously
summoning
commanders
of the troops
as witnesses.

(6) Memo. by Sir W. M. Gomm, Simla, 16th Oct. 1854.

the paragraph above quoted may be considered and taken to be part of the said circular. (7)

896. No form of summons is prescribed by the mutiny act, but a form was appended to the Regulations in 1868, (8) which states the precise time and place of the assembling of the court, and commands the witness to appear at his peril. The summons is served by the provost marshal general on courts martial attended by the judge advocate general, and, in other cases, by the provost marshals, their deputies, or non-commissioned officers appointed for the duty, or upon civilians, in certain cases, when more convenient, through the intervention of the police force, or local functionaries, at the request of the military authorities. (9)

Summons, form of, not essential, but now provided by regulations.

By whom served.

897. The summons should be served personally on the witness, particularly if not subject to military law, and in reasonable time before the day of trial, that he may suffer the less inconvenience from his attendance on the court. (1) Notice to a witness in the morning to attend in the afternoon of the same day has been held too short, though the witness lived in the same town and very near to the place of trial; (2) but a person, present in court, may be summoned as a witness without previous notice. (3) If the witness, whose attendance is required, be a married woman, it will be necessary to serve the summons upon her personally, the service upon her husband is not held sufficient. (4)

Summons served personally.

898. Witnesses before courts martial are protected from any civil action in respect to evidence they may give. [§ 1356-7.] If duly summoned by the judge advocate of a general court martial, or by the president of other courts martial, they are privileged from arrest during their necessary attendance in or on, and in going to, and returning from, courts martial, and if unduly arrested, it is imperative on the court out of which the writ or process issued by which such witness was arrested, to discharge him. (5) In the ordinary courts of law it is not necessary that a witness should have been served with a subpoena, if, upon application to him, he consent to attend without one. But it has not been decided that this applies to proceedings before courts

Witnesses protected from civil actions for libel or slander;

privileged from arrest.

(7) Circular, Horse Guards, 15th March, 1855.

(8) Q.R. App. B. (13.)

(9) As to military witnesses from distant stations, Q.R.S. 6, p. 60. See § 901.

(1) 2 Phillips, 427. Taylor, 1073.

(2) Taylor, 1073.

(3) 2 Phillips, 427. Taylor, 1074.

(4) 2 Phillips, 428. Taylor, 1083.

(5) M.A. 13.

martial; the terms of the statute, by which protection is afforded,—*all persons duly summoned as witnesses*,—do not include witnesses attending without a summons.

Summons to
produce writ-
ings;

899. If any person has in his possession or under his control any papers, letters, accounts, returns, orders, books, writings, or other documents which are thought necessary to the trial, a special clause is inserted in the summons to attend, called by lawyers a *duces tecum*, requiring him under the like penalties to bring them with him; otherwise a witness has it in his power to refuse to acknowledge a personal or informal request as a sufficient notice to produce documents. (6) The prosecutor may, in this way, be required to produce documentary evidence at the instance of the prisoner. The prisoner, however, cannot be compelled to furnish evidence against himself, but the prosecutor may call on him, through the judge advocate or the president, to produce any documents in his possession, and if they are refused, after proof of reasonable notice, secondary evidence of the contents may be admitted.

documents
in possession
of adverse
party.

Witness
must bring
documents
required
by summons,

and produce
them in obe-
dience to the
decision of the
court.

900. A witness served with a summons is obliged to attend; and though it will be a question for the consideration of the court, whether he ought to be compelled to produce the writings in his possession, yet he ought to be ready to produce them, if required by the court; and in case of disobedience, without sufficient cause, will be liable to attachment; or a military witness to arrest and trial by a court martial.

Military
witnesses,

901. Instead of a personal service of the summons, military witnesses, if officers, are occasionally summoned by letter from the judge advocate; if soldiers, the judge advocate addresses a letter to their commanding officer, requiring their attendance, and he, when requisite, makes the necessary application for a route or order through the usual channel. (7)

before minor
courts martial,

902. In the case of minor courts martial, military witnesses for the prosecution, and also any whom the prisoner may require for his defence [§ 416(7)], are generally warned to be in attendance on the assembly of the court, in order to prevent the delay incident to a legal summons from the president.

(6) Col. Crawley's Trial, Q.1522,

(7) Q.R.S.6,p.60.

903. Officers under arrest, and soldiers who are confined or imprisoned in military custody, may be produced as witnesses, on the order of the commanding officer. Military offenders under sentence of imprisonment by a court martial, in a common gaol, may be removed in military custody, for the purpose of giving evidence before a court martial, as for removal to another place of confinement [§784]; and soldiers confined in a military prison may be removed for this purpose on the order of the general or other officer commanding the district in which it is situated. (8) Persons, whether civilians or belonging to the service, who may be detained in the custody of the civil power, either on a civil or criminal process, may be brought by a writ of *habeas corpus*, or an order of a secretary of state or one of the judges of the superior courts, for examination as witnesses before a court martial, in like manner as they may be brought up before magistrates or courts of record. (9) Prisoners of war may be brought up, upon application to the local chief of the department, or, in special cases, to the Secretary of State.

in arrest or confinement, or imprisoned in military custody.

Military witnesses in common gaols; in military prisons.

Witness in custody of civil power.

Prisoners of war.

904. Claims for the expenses of witnesses, whether civilian or military, in attending courts martial, must be clearly stated and certified by the president to be just and reasonable. (1) Officers attending courts martial as witnesses receive travelling expenses as specified in the royal warrant, but when summoned as witnesses for the defence of officers, who are found guilty, or as witnesses at courts martial, founded on personal disputes between officers, the expense must be specially sanctioned by the secretary of state for war. (2) Non-commissioned officers and soldiers of the army or marines, and petty officers and seamen of the Royal Navy, attending as witnesses, in every case receive the usual travelling expenses, which are charged by the corps to which the witness belongs. (3)

Expenses of witnesses;

uncertain cases, only when specially sanctioned;

officers;

soldiers.

(8) Letter, War Office, 14th July, 1847.

(9) 43 Geo. 3, c. 140, s. 16; and 17 Vict. c. 30, s. 9.

(1) Explanatory Directions, Travelling Expenses, 1st April, 1872, *Para.* 15.

(2) Royal Warrant, Travelling Expenses, 1st April, 1872, *Art.* 2i:—
“When claims for such witnesses are forwarded for the special consideration

of the secretary of state they must be supported by a certificate from the president of the court martial, that their evidence was necessary or pertinent to the defence.”—*Secretary of States Instruction* annexed.

(3) Circular, W.O.749, 2nd April, 1862; Explanatory Directions, Travelling Expenses, 1st April, 1872, *Para.* 12.

No express provision for the expenses of civilian witnesses.

Civilian witnesses at home,

but claims entertained at the War Office.

Authority for the payment of civilian witnesses, interpreters, &c., abroad,

according to the rates established in civil courts.

Principle of payments in other cases,

of travelling expenses ;

905. However expedient and reasonable it may be, that civilians attending to give evidence in furtherance of public justice, should be compensated for unavoidable expenses incurred ; and for loss of time ; yet, neither the president nor any court martial has power to decide as to the propriety of their receiving payment of their expenses, nor are they in point of law entitled to any compensation. (4) They are obliged, as before observed, [§891] to attend and give evidence unconditionally. The recent explanatory directions do, however, recognize the claim, as above-quoted, [§904] and further lay down that when any charge is made by civilian witnesses as compensation for loss of time in attending the court, their trade or occupation must be stated in the claim ; and the actual and necessary period of the allowance. Claims of civilian witnesses for attendance at courts martial at home, are submitted for the approval of the secretary of state for war before payment. (5)

906. The following regulations as to the payment of the expenses of civilians summoned as witnesses, &c., before military courts on the several foreign stations, were established by the lords of the treasury in 1833:—"At any station where there may exist a tariff regulating the amount to be paid to witnesses summoned before *civil courts*, or where there may be any other established mode of dealing with such claims, such tariff or established practice should be made the criterion of settlement for civilian witnesses attending military courts, the president of the court certifying in each case that the same is in conformity thereto, but where no such tariff or established mode of settlement exists," their lordships were "of opinion that the actual expenses of the parties for their conveyance to, and in returning from, the place where the court may sit, should be allowed ; so far at least as they might not, in the opinion of the president of the court, have unnecessarily resorted to

(4) It were to be wished that the principle of the enactments for the payment of the expenses of witnesses in the ordinary criminal courts had been extended to the case of witnesses attending courts martial, especially witnesses not military.

At naval courts martial, witnesses not subject to the naval discipline act receive payment of "reasonable ex-

penses" from the judge advocate, who is repaid, under the direction of the president, by the paymaster of the flagship at the port where the court martial is assembled.—*Naval Regulations*, Chap. xi. 26.

(5) Explanatory Directions, Travelling, Para. 16. Payment is ordinarily allowed according to the rate authorised by the Home Office scale.

a mode of conveyance superior to their respective stations, or conditions in life; and secondly, with regard to their personal expenses on the road, and during their necessary detention at the place of the court's session, that they should receive rates of daily allowance depending on the station of the individual or the special circumstances (if any) of each case, but in no instance exceeding *ten shillings* per diem; that in the case of persons proceeding by sea, and paying a certain sum to the master of the vessel for their conveyance, *including their subsistence*, the sum so paid (subject to the control of the president of the court, upon a consideration of the station in life of the party) should, in conformity with those principles, be allowed, the daily allowance for personal expenses of course not being in this case issuable; and no allowance whatever is to be made to persons residing at, or conveniently to, the place where the court may be held." (6)

personal expenses,

according to a daily rate,

or actual sum paid during passage;

none allowed to persons on the spot.

907. In addition to the provision which is made for the compulsory summons of witnesses and against their withholding legal evidence (as specified, § 890-2), the mutiny act also declares that witnesses taking a false oath or declaration before courts martial "shall be deemed guilty of wilful and corrupt perjury," and renders them liable, on conviction before a competent court of criminal jurisdiction, to the penalties incidental thereto, and, if officers or soldiers, to punishment by court martial. (7)

Witnesses examined by a court martial and committing perjury are punishable by the civil tribunal, or a court martial;

908. Those persons, who, by the operation of special statutes [§ 452-3], are permitted to make a solemn affirmation or declaration, under the provisions of the same statutes, incur the penalty of wilful and corrupt perjury for making a false affirmation or declaration.

and equally so when excused from taking an oath.

909. Courts martial, under the powers now conferred by the mutiny act [§ 146], may order a military witness, committing perjury before them, into arrest or confinement. With respect to witnesses not subject to *martial* law, and who may commit perjury before a court martial, the court can do no more than draw the attention of the superior authority to the circumstances in order to the taking of ulterior measures in the civil courts.

Courts martial powerless as regards civilians, except to suggest prosecution before competent tribunal.

(6) Circular, C.S., Treasury Chambers, 24th May, 1833. (7) M.A.96.

CHAPTER XXI.

OF THE COMPETENCY AND INCOMPETENCY OF WITNESSES; AND OF
THE EXCLUSION OF EVIDENCE IN PARTICULAR CASES.

Objections to
competency;

910. WHEN a witness is produced, and before he is sworn, [§440] any objection to his competency ought to be taken, if it be known; but it is held that the objection may be raised any time it may be discovered during the trial.

to credibility;

911. Objections to the *credibility* of a witness must be reserved for the defence, or the reply of the prosecutor. An exception to the credibility of a witness does not prevent his testimony being received, but his credit may be attacked by questions on cross-examination, or by general evidence of bad character. [§980]

objections
arising from
infamy or
interest do
not affect the
competency,
but raise the
question as to
the credibility
of a witness
so impeached.

912. Lord Denman's act, passed in 1843, most beneficially relieved courts martial, in common with other courts of justice, from the necessity of considering the perplexing questions, as to the incompetency of witnesses by reason of infamy and interest, which had arisen under the previous law. It lays down the broad principle that it is desirable that "the persons who are appointed to decide upon the facts on issue should exercise their judgment on the *credit* of the witnesses adduced, and on the *truth* of their testimony;" and enacts "that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, . . . but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial . . . or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a

witness may have been previously convicted of any crime or offence." (1)

913. This act excepted the actual parties: Lord Brougham's act, 14 & 15 Vict. c. 99, repeals this exception (*sec. 2*); but makes a proviso (*sec. 3*) as to criminal proceedings, here given at length, because it declares the law, which is binding on courts martial, in the very clearest terms:—"Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." [§917, 961(3)]

No prisoner before a court martial is competent or compellable to give evidence for or against himself,

nor is his wife.

914. In criminal prosecutions before courts of civil jurisdiction the injured party may be a witness, even though, on conviction of the prisoner, he becomes entitled to a reward. Upon the same principle a prosecutor before a court martial [§571] (though he may himself have originated the charges, or may, in any other way, indirectly be personally interested in the result,) has always been a competent witness;—the court in this, as in all cases of suspicion, judging of the degree of credibility to be attached to his testimony.

Prosecutor competent,

although materially interested in the event of the trial.

915. Before courts martial, as in criminal courts, where several persons are charged separately with the same crime, though it be perjury in swearing to the same fact, any one, not on his trial, may be admitted as a witness for the others. Prisoners, therefore, who are awaiting their trial, or who have been tried upon a charge identical with that upon which a prisoner is being tried, may be called by him in his defence; although, especially in the first case, when the witnesses' credibility could not be tested by a searching cross-examination, their evidence must be received in many cases with a certain amount of suspicion. The late courts martial in Jamaica furnished instances of both these cases. Ensign F. J. Cullen, 1st W. I. Regiment, and Staff Assistant Surgeon Henry Morris were tried separately upon an iden-

Prisoners separately charged on identical crime, mutually competent witnesses, either,

1. when awaiting trial; or, 2. after their own trial is closed.

(1) 6 & 7 Vict. c. 85, s. 1.

Their evidence
received after
caution,

but not tested
by cross ex-
amination,

when their
own trial is
pending.

But separate
trial has not
been held to
justify courts
martial in re-
ceiving the
evidence of a
co-defendant
not acquitted,
convicted, or
pardoned
against the
prisoner; but

It was admitted
on his being
released from
confinement.

tical charge. Ensign Cullen was first tried, and called Dr. Morris in his defence. He was "cautioned by the deputy judge advocate that he, the witness, being himself a prisoner awaiting trial on a charge similar to that on which the prisoner is arraigned, should not attempt to reply to any question which might have a tendency to prejudice his own case." (2) He denied the charge in the most precise terms, but the prosecutor abstained from cross-examining him "under the circumstances officially known to the court;" and "the court also abstained from putting any questions to the witness." (3) Ensign Cullen was in his turn called by Dr. Morris, and, his own trial being now closed, was subjected to a cross-examination by the prosecutor and a prolonged examination by the court. (4)

916. But separate trial, though it renders fellow-prisoners competent witnesses when called for the defence, has not been held sufficient when the evidence of a prisoner has been desired by the prosecution against another prisoner implicated in the same charge. At the trial by general court martial at Dublin in 1866 of Colour Sergeant Charles McCarthy, 53rd Regiment, in connection with the Fenian conspiracy, Lance Corporal Michael Brennan, who it appears was awaiting his separate trial on a similar charge, and had offered to state what he knew, was about to be sworn, when "the prisoner objected to his competency on the ground that he was included in the same charge with him, and had not been acquitted, convicted, or pardoned." (5) The prosecutor replied that his trial had been "dispensed with" by competent authority, and it was suggested by the deputy judge advocate that he must enter a *nolle prosequi* (6) before he could examine him. The memorandum "by order" dispensing with his trial, was thereupon entered on the proceedings, and Brennan was released from confinement before being sworn and giving his evidence. (7)

(2) Proceedings, 22nd Nov. 1826, Blue Book, p. 83.

(3) *Ib.* 84.

(4) Proceedings, 11th Jan. 1867, Blue Book, p. 214.

(5) First day, 28th May, 1866.

(6) The effect of a *nolle prosequi* in the civil courts differs from that of the release of an officer or soldier from arrest or confinement, in this respect;—

it does not operate as an acquittal and the co-defendant may be again indicted, whereas the offence of the military prisoner is condoned. [§ 565].

(7) The deputy judge advocate, in his summing up,—which, it is understood, had the previous sanction of the highest authority—considered Brennan a "competent witness," but added, "Still it is my duty to tell you

917. The evidence of accomplices and accessories against their associates in crime, as also of the principal against his accessory, (as, for instance, of the thief, against the receiver,) is admissible, and must of necessity be admitted in many cases, but it should always be received with great jealousy and caution. A conviction upon the unsupported testimony of an accomplice may, in many cases, be strictly legal, but it is the prudent practice to require it to be confirmed, by unimpeachable testimony in some material part, and more especially as to his identification of the person, or persons, against whom his evidence may be received. (1) Where the testimony of an accomplice is thus confirmed, it affords ground for believing that he speaks the truth in other points, and with respect to circumstances, as to which there may be no confirmation. (2)

Testimony of accomplices admissible, but

requires confirmation,

and more especially as regards the person of the prisoner.

918. Prisoners jointly arraigned are not competent as witnesses on the trial of each other; yet, in criminal prosecutions, where there are several defendants on trial, and it appears, on closing the case for the prosecution, that against one or more of them there is no evidence to convict, the court will, in its discretion, take a separate verdict of not guilty; and such defendant or defendants, so acquitted, are admitted to give evidence on the trial of the remaining prisoner, or prisoners. (3) Upon the same principle a defendant who has

Prisoners arraigned together

are rendered competent by separate finding, or by a plea of guilty.

(the court) that as he stands in the position of an accomplice, and an informer, and as from his own mouth you heard that he had taken an oath of allegiance to the Queen, and also an oath of allegiance to the Fenian Brotherhood, you ought not to act on his evidence unless it is corroborated in its main particulars."—*Twelfth Day*, 13th June, 1866. Sergeant McCarthy was found guilty, and sentenced to be shot, but the sentence was commuted by Her Majesty to penal servitude for life.

(1) Confirmation as to the circumstances, only confirms a man's own avowal, that he was concerned in the offence. Confirmation as to the person can alone connect the prisoner with it;—and it must always be borne in mind that accomplices are necessarily of tainted character, and may be tempted to accuse a person, wholly innocent, from motives of revenge, or to screen themselves or a guilty associate. 1 Phillips, 89-101. Taylor, 860-3.

(2) 1 Phillips, 97. See § 868.

(3) 1 Phillips, 51-2. Taylor, 1178. The provision in Lord Brougham's act, [§ 913] as to the exclusion of the evidence of a prisoner against himself having been supposed to render it admissible against a fellow prisoner jointly indicted with him, the point was reserved on a trial in 1871, and the case having been argued before all the judges (Jan. 27, 1872), the Lord Chief Justice (Cockburn) pronounced their unanimous judgment that such evidence was not admissible. "We are all agreed that the exception in 14 & 15 Vict. c. 90, s. 3, was introduced to prevent any possibility of its being thought that the law as it had existed from the earliest times was altered by the Act. By that law it was a distinguishing characteristic of our criminal system that a prisoner on the trial can neither be examined nor cross-examined."—*Law Reports. R. v. Payne*, 1 Crown Cases Reserved, 355.

pleaded guilty is an admissible witness for or against his co-defendants; (4) as was pointed out by the judge in his charge to the jury in the celebrated case of four American citizens convicted of bank forgery in the year 1873. The rule in civil courts, though founded on reason and justice, cannot be acted on to the full extent by military courts from the necessity of the sentence being confirmed in order to its taking effect, and the incidental delay; but if the evidence against a prisoner should prove insufficient to convict him, and his testimony is deemed essential, there can be little doubt but that the court may proceed to acquit him, and adjourn to allow time for confirmation; and on promulgation of the acquittal reassemble and proceed with the examination of the witness now become competent.

Prisoner
desiring
testimony
of soldier
involved in the
same charge
must apply to
be tried
separately.

Case of
Muspratt.

919. The regular course to be adopted by a prisoner who desires to avail himself of the evidence of a person included in the same charge, is for him, when he receives the copy of the charge, to represent the necessity of his separate trial to the authority ordering the court martial; and, if such representation were not attended to, an application to the court would still be open. Mr. McArthur quotes a case directly in point: it was a naval court martial, where confirmation is not necessary to render the sentence operative; but it is very clear, that the law of the case, being essential to justice, and not a matter of form only, must be precisely the same in the case of all courts martial: William Muspratt, a seaman, was arraigned with nine others, for mutiny on board His Majesty's ship *Bounty*; also for desertion and running away with the ship. The evidence for the prosecution did not materially affect two of the number, Byrn and Norman; upon which Muspratt, by advice of counsel (afterwards Lord Erskine), urged their acquittal, to enable him to call them as witnesses, setting forth the ordinary practice of criminal courts in such cases. The court refused the application upon the ground of its being contrary to the usage of courts martial to give sentence on a particular prisoner until the whole of the defence of the prisoners was gone through. Muspratt, and five of those tried, were found guilty and sentenced to suffer death; Byrn and Norman, and two others, were acquitted. Whereupon Muspratt petitioned the Admiralty, praying that he might have an oppor-

tunity afforded him of laying his case before the Throne for mercy. The Admiralty deemed it expedient to lay the facts before the attorney general, the solicitor general, and the counsel to the Admiralty, for their joint or separate opinions, whether there were any objections to the carrying the sentence against Muspratt into execution. They delivered their opinions separately; they concurred that it was the custom of criminal courts, in such cases, for the judge in his discretion to direct the acquittal of an innocent person, to enable him to give testimony, and they inclined to the opinion that Muspratt was entitled to the benefit of a similar proceeding in the case in question; the two former forbore to speak positively, as they suggested the propriety of submitting the case to the judges; the latter delivered his decided opinion that Muspratt was entitled to the advantage of the testimony of Byrn and Norman, and advised the Admiralty to interpose in his behalf in obtaining the royal mercy. The twelve judges were appealed to, and, in consequence of their opinion, Muspratt obtained His Majesty's pardon: four of the other prisoners, who received judgment with him, were executed. (5)

Case of
Muspratt.

(5) It appears by a letter of Lord Erskine, prefixed to James's Collection of Sentences of Courts Martial, that the respite of the prisoner was directed by His Majesty on the direct application of the prisoner's attorney:—"One of the mutineers at Portsmouth...was tried with others, and as it was likely that against *one of them who knew the innocence of the person in question*, no evidence could be given, I advised the attorney who was employed by him, if that turned out to be so, to apply to the court, on the authority of my opinion, to direct such person to be acquitted, and then to permit him to establish, by his evidence, the innocence of the man in question. This application being accordingly made, the court declared itself to be satisfied that the course proposed was agreeable to the practice of the courts of criminal law, but not of courts martial; they, therefore, refused to adopt it, and, having no other defence, he was sentenced to be executed. Being then on a visit in the Isle of Wight, and the attorney from Spithead having communicated to me this decision, I despatched him immediately to Weymouth with a representation to the late King, in which I humbly sug-

gested to His Majesty that the court martial ought to have conformed to the rule established in the common law courts, and implored the king, in the name of the unhappy man who had been unfortunately convicted, to respite the execution, and to submit his case to the twelve judges for their decision on it. His Majesty, with his usual humanity and enlightened attention to the demands of justice, instantly sent back the attorney with the respite prayed; and the judges having decided unanimously that the conviction was *unwarranted*, the man was set at liberty. There can be no doubt that neither in this case nor in any other of a similar description could there have been an appeal to any of the courts of justice. It belongs to the *king alone* to abrogate or confirm the sentences of courts martial; but the judgment of his late Majesty, so remarkable during his long reign for his faithful and enlightened administration of justice, ought to be received as a precedent hereafter; and I feel great pleasure, therefore, in making this communication, being deeply interested in everything which concerns the noble profession of my earliest youth."

Defect of
understanding;

920. The evidence of those persons is rejected, who are prevented from understanding sensible questions put to them, or giving rational answers, either by want or disorder of intellect, as in the case of idiots, lunatics, and witnesses drunk in court, or immaturity of understanding, as in the case of children. (6)

insanity;

921. The incapacity, however, as well put by Mr. Taylor, is only co-extensive with the defect. Thus a monomaniac or person who is afflicted with partial insanity will be an admissible witness if the court finds that he is aware of the nature of an oath or declaration, and that he is capable of understanding the subject with respect to which he is required to testify. So too in lucid intervals, persons of disordered intellect, whose minds may have sufficiently recovered, are competent; and witnesses put aside when drunk may be examined when sober. (7)

Admissibility
of a child.

922. The admissibility of a child to give evidence is regulated, not by his years, but by the development of his mental faculties; by his religious knowledge; and by the sense he may entertain of the consequences of perjury;—subject to which a child of any age may be examined as a witness. (8)

Defect of
religious prin-
ciple.

923-4. Although the law no longer holds a man incompetent to give evidence if he disbelieves in the existence of God; or if he does not profess any religion which may bind his conscience to tell the truth, it does not receive any testimony until the witness (if not belonging to a barbarous and uncivilised tribe [§ 453]) has, in one form or other, either given an outward pledge that he considers himself responsible to God for the truth of what he is going to answer, or at least rendered himself liable to the temporal penalties of perjury, in the event of his wilfully and corruptly giving false testimony. (9)

Husband
and wife
reciprocally
incompetent
for or against
each other,

925. Husband and wife [§ 913] are not admitted as witnesses for or against each other, in any criminal proceeding; nor are they permitted to give evidence where the evidence

(6) Taylor, 1193.

(7) See Taylor, 1193. 1 Phillips, 8.

(8) 1 Phillips, 8. Taylor, 1195. In a case at the Old Bailey, in 1849, Baron Alderson refused to postpone the trial for the purpose of instructing a child, stating that all the judges now were of opinion that it was an

incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable."—1 Phillips, 10.

(9) Taylor, 1196. As to forms of oath before courts martial, see § 440-9; and as to relaxation of the general law, see § 453-4.

may tend to *criminate* each other collaterally. The one is a competent witness in a cause between *other persons*, the result of which may contingently and essentially benefit the other; as a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, that in the case of his conviction, her husband would receive a pardon. (1) But the benefit must not be direct; two being indicted for burglary, and a witness for the prosecution identifying both the prisoners, they each set up a distinct *alibi*; when it was held, that the wife of one was not a competent witness to prove the *alibi* of the other, and it was decided by a majority of the judges that the witness had been properly rejected, because, though she did not in terms give evidence for her own husband, yet her testimony went to shake the credit of the witness for the prosecution. (2)

but may give evidence against third parties, though the result may contingently affect one of the married parties;

not if benefit be direct.

926. A wife may give evidence against her husband, in a prosecution for any personal injury. (3) So also, a woman, taken away and forcibly married, may give evidence for or against the offender. (4) The dying declarations of a wife are evidence against her husband on his trial for her murder. (5)

On a criminal offence against the person of either, husband or wife a competent witness against the other.

927. It has been erroneously imagined by some military men, that on a charge before a court martial for a breach of military discipline, the wife of the prosecutor is not a competent witness. Her testimony may be suspicious in an equal degree with that of the prosecutor; but there is no rule or reason to exclude it. Any attempt to deceive may be exposed with greater facility by the opportunity afforded of cross-examining two witnesses to the same fact, than if one only was admitted to give evidence; if, therefore, the accused be innocent of the charge, the advantage of separately examining both husband and wife is entirely in his favour.

Wife of the prosecutor competent witness.

928. The fact of a woman cohabiting with a party to the trial, though it affects her credit, does not afford ground for rejecting her testimony. The rule of exclusion extends only to the lawful wife of the prisoner. (6)

Woman cohabiting with party, not incompetent;

(1) 1 Leach, 161.

(2) *Rex v. Smith*, before the twelve judges, 1826.—Taylor, 1184.

(3) Taylor, 1190.

(4) *Hawkins*, c. 42, s. 9. 1 Phillips,

83.

(5) 1 Phillips, 81.

(6) 1 Phillips, 106-7. Taylor, 1185.

other relation
does not
inappreciate.

929. The testimony may be open to suspicion in other cases, but no relation except that of husband and wife *excludes* from giving evidence: the parent may be examined on the trial of the child, the child on that of the parent; the master for or against the servant, the servant for or against the master.

Counsel,
attorneys
employed, and
interpreters,
how far bound
to be silent;

930. Counsel and attorneys, or, in India, vakeels, cannot be called on, nor, indeed, would they be permitted to reveal secrets confided to them by their clients; and the same applies to their clerks. So likewise an interpreter, who is present at conversations between a foreigner and his attorney, is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him as the medium of such confidential communications, even after the end of the cause, for the purpose of which the confidence was placed. But this protection of confidential communications to legal advisers does not extend to information they have acquired independently of, and not arising from, those professional connections; nor to communications in reference to a contemplated fraudulent purpose. (1) This privilege is the privilege of the client, and therefore, if he waive it, the professional adviser cannot refuse to answer such questions as the court may demand of him, and, on the other hand, though he may be willing to do so, he is not allowed to divulge his client's, or his *quondam* client's, secrets unless he does consent. (2)

the privilege
is that of the
client, and
remains without
reference to
time, and can
be waived only
by him.

Exclusion
of disclosures
prejudicial
to public
interest.

931. Persons who are the channel of the detection of crime, are not to be unnecessarily disclosed; a spy, therefore, is not obliged to name his employer. (3) A witness for the crown cannot be compelled to state through what channel he made a disclosure to government, either immediately or mediately. (4)

Persons in the
employ of
government,
how privi-
leged.

932. A person in the employ of government cannot be required to divulge the nature of his instructions, or any confidential communication. On the trial of Watson for high treason, a clerk of stores in the ordnance department, who had resided many years in the Tower, was called for the purpose of proving that a plan found at the lodgings of the

(1) Judges, Tichborne Trial, 8th July, 1873.

(2) Taylor, 812-830.

(3) 1 Phillips, 133.

(4) 1 Phillips, 136.

prisoner was a plan of part of the interior of the Tower; having proved this to be the case, he was afterwards asked, upon cross-examination, whether another printed plan (which was shown him) upon a regular scale, was a correct plan of the Tower, for the purpose of showing that such maps might be purchased without difficulty in the shops in London; but the court held that it might be attended by public mischief, to allow an officer of the Tower to be examined as to the accuracy of such a plan. (5)

933-9. It may be added in this place, although, apart from their tendency, such questions ought obviously to be rejected as irrelevant, that questions tending to injure and degrade third persons not connected with the trial are not permitted.

Irrelevant
questions
respecting
third persons.

(5) 1 Phillips, 137; and see § 894.

CHAPTER XXII.

OF EXAMINING WITNESSES AND DISCREDITING THEIR TESTIMONY.

Examination of
witnesses.

Witnesses
examined in
open court

not by a
deputation of
the court, but

not necessarily
at the place of
assembly.

The prejudices
of native wit-
nesses of rank
in India must
be respected,
but not so far
as to dispense
with their per-
sonal examina-
tion by the
court.

Ladies of
the zenanah.

Native princes.

940. WITNESSES at courts martial are necessarily examined on oath, except in certain cases already mentioned, [§452] and invariably in the presence of every member of the court, and of the parties to the trial. The court is thereby enabled to observe their demeanour, inclination, and understanding; points essential to the formation of a correct judgment as to the value of their testimony: the adverse party is also afforded an opportunity of objecting to their competency [§573-9], or of trying their credibility by cross-examination.

941. It is not competent to a court martial to examine a witness by deputation of part of their number; nor to receive evidence on interrogatories, or by affidavit. When in special circumstances an important witness is prevented from attending at the appointed place of assembling, the court may, with the concurrence, or on the order, of the convening authority, assemble at or adjourn to the bedside or the quarters or residence of the witness. In India the courts issue commissions to examine persons exempted by reason of rank or sex from personal appearance in court; but a court martial (held under the mutiny act) has no such power, and must require the presence of the witness. In the case of "women who according to the custom of the country do not appear in public," (1) due care, as regulated by local custom, is taken to provide screens or such other mode of concealment as may be necessary to prevent the witness being publicly seen. In special circumstances, as the case of members of ancient sovereign houses, there can be no objection to the court martial adjourning to their residence near the place of assembly, and conducting their examination in such manner as their recognised position in India may render expedient.

(1) Indian "Code of Criminal procedure," 1861, sec. 124.

942. At courts martial, unless when in exceptional circumstances the prosecutor is called as a witness for the defence, [§ 945] no witness (1) is permitted to be present during the examination of another, with the view of guarding against the influence of previous examinations upon the testimony of succeeding witnesses, and of rendering collusion more difficult. When a prisoner had, with the consent of a brother officer, whose name was on the list of witnesses, solicited the court to permit his assistance during the trial, the request was refused; and the court, in its remarks subjoined to the sentence, animadverted on the request, observing as to the conduct of the officer in authorizing the application: "That the paramount duty of an officer, and more especially of an officer of rank," (the officer referred to was the major of the regiment,) "is to support discipline by adherence to the principles of established rules, rather than indulge an impulse however amiable, perhaps to the prejudice of justice, or countenance misconduct by injudicious commiseration." (2) In confirmation of this rule it may also be noticed, that the adjutant general and quarter master general, who had belonged to the expedition to Buenos Ayres, had been summoned, on the part of the prosecution, as witnesses on the trial of Lieut. General Whitelocke: the lieutenant general, conceiving they might be of use to him in his defence, submitted to the court that they might be permitted to be present during the trial; the judge advocate, who prosecuted, observed that the evidence of those officers was material for the prosecution; the court, after deliberation, determined that Lieut. General Whitelocke's request could not be complied with, but that he might speak to them as often as he thought proper. (3)

Witnesses
examined
separately.

(1) This is not the case in civil courts of English judicature, but either party, at any period of a cause, has a right to require that the unexamined witnesses shall be sent out of court. *Southey v. Nash* 7 C. P. 632. In Scotland, so strictly is this rule observed, that if a witness has been present in court during the examination of another witness, so as to hear his evidence, he will be rejected. 2 Hume, *Criminal Law of Scotland*, p. 365. Mr. Tytler, guided by this custom of the courts of Scotland, has applied the principle to courts martial; he states (p. 248) that the circumstances of wit-

nesses being present during previous examination, would of itself afford a valid objection to their testimony, being a species of subornation. It is conceived that this author had not sufficiently recollected that the practice of *English* courts of judicature can *alone* be referred to when the custom of courts martial cannot be confidently relied on.

(2) G.O. on the promulgation of the sentence of a general court martial on Ensign Alex. Sutherland, 91st Regiment, 10th July, 1813.

(3) Lieut. Gen. Whitelocke's trial, p. 2.

Exceptions ;
witness
inadvertently
present during
the examina-
tion of
another ;

witnesses may
be confronted.

Prosecutor,
if witness,
examined
before other
witnesses.

Prisoner may
insist on the
testimony of
the prosecutors
and judge
advocate.

Member of a
court martial
may give evi-
dence.

943. This custom of examining witnesses separately, though highly desirable and conducive to the development of truth and the detection of falsehood, is not so rigidly observed as to exclude the testimony of persons who by inadvertence, have been present at the examination of other witnesses, or have not been called (as, for example, in reply) until they have heard others examined. They are not thereby rendered incompetent, though in certain cases it may be for the court to receive their evidence with additional caution.(4)

944. It is competent to a court martial to confront any two or more conflicting witnesses ; that is, to call into court, at the same time, any two or more witnesses, and call upon them to repeat their evidence in the hearing of the other, or to reconcile their testimony, reading over to each the evidence of the other, and requiring an explanation of such parts as are inconsistent or contradictory, in order to ascertain, as far as possible, the real truth of the case ; but it would not be advisable, nor perhaps just, to do this before the close of the cross-examination.

945. The prosecutor, being necessarily present during the examination of all witnesses, in the now exceptional case of being required to give evidence for the prosecution, is sworn immediately after his opening address, if any [§571] ; nor would it be proper, (5) at any other stage of the proceedings, to admit his deposition in chief, *except* when called as a witness for the defence.

946. A prisoner may insist on the testimony of the prosecutor, [§914] and may call upon him to produce documents of any kind, which he may deem necessary for his defence. He has also a right to call the judge advocate as a witness. [§480]

947. A member of a court martial is a competent witness, and may be sworn to give evidence in favour of, or against a prisoner, at any stage of the proceedings ; but this is to be

(4) Lord G. Sackville's trial, 280.

(5) A proceeding, which is believed to be equally opposed to the customs of courts martial and civil courts of judicature, is reported to have been permitted on the general court martial which was held at Cork, in December, 1833, for the trial of Captain Wathen, of the King's Hussars. The papers of the day, which reported the proceedings in full, stated that the prosecutor offered himself on the ninth day,

and was accepted as a witness in support of the *three first charges*. When it is considered that he had opened his case by an address, and had for eight days examined witnesses on *these charges*, there can be but one opinion as to the inadvertence of the proceeding : nor ought this deviation from the well-established custom of the service to have any effect in unsettling a practice which is essential to the due administration of justice.

avoided, if foreseen. It need scarcely be observed, that no communication by a member in closed court can be received; he must be sworn as other witnesses, in open court, and be subject to cross-examination; neither ought the private knowledge of any fact to influence the particular verdict of a member; he is sworn to administer justice strictly according to the evidence before the court, not his private grounds of belief in his own breast. This corresponds with the rule as to jurors in the ordinary criminal courts. "Though each jurymen may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict." (6)

948. It is a question, very often raised, whether or not courts martial are competent to originate evidence; that is, of their own motion, to call into court a witness not produced by the parties before the court. There is no doubt but that the court may, at any period of the trial, recall any witness for further examination, if any question occur to the court or is suggested by either of the parties, [§577, 580] the witness being subject to cross-examination in respect to the point so raised. It would also seem that the custom of the service would justify the calling for a document or summoning any person mentioned in the evidence before the court, if at hand, and his examination might throw light upon a special point which wanted further proof, but it is apprehended that this is the utmost extent to which a court would be authorized to go. (7) A court martial might involve itself in an inextricable labyrinth, were it to stay proceedings and adjourn in order to obtain testimony. [§580] Much less would a court martial be justified (should it appear that

Whether a court martial can originate evidence.

(6) Taylor, 1196-7. See § 511.

(7) On the trial of Lieut. General Sir John Mordaunt, in 1757, "the evidence both for the crown and the prisoner being ended," the court resolved that Admiral Sir E. Hawke, who had arrived in town since the last sitting of the court, should be examined; and it was "ordered that Lieut. Gene-

ral Sir John Mordaunt have notice of the above resolution of the court, and that he will be at liberty to propose any questions he shall think proper, as likewise to produce any witnesses to obviate or explain any evidence which may arise from the examination of Sir Edward Hawke."—*Printed Trial*, 108.

the testimony produced by the prosecutor was insufficient or inconclusive) in receiving evidence, in support of the prosecution, after the prisoner had been placed on his defence [§601-3], except for the purpose of meeting new matter which had been adduced by the prisoner.

Examination
through an
interpreter.

949. Witnesses must necessarily, in many cases, be sworn and examined by means of an interpreter [§477-9]; and the court may also at any time resort to an interpreter, if such assistance appear desirable to them; or if the parties to the trial or the witness himself should make a request to this effect, and the court should concur in the propriety of the application.

Deaf or dumb
witness.

950. Persons who are deaf or without the power of speech, may be questioned or give evidence, by writing or by signs.

Deaf and dumb
witness.

951. A deaf and dumb person, who enjoys the full use of his reason, may be examined by writing, or by signs, in open court, by means of a person capable of conversing, and sworn to interpret faithfully.

Charges no
longer read.

952. The present and better practice of the service is decidedly against reading the charge(1) to the witness about to deliver his testimony. It had always been held that if the charge instructed the witness how to answer and had the effect of a leading question, as, for example, on a trial for disrespect, the prisoner being charged with using particular expressions and the precise words being specified, the words should be omitted; and similarly in all cases any detail, whether of circumstance, gesture, or expression, to which the prisoner might reasonably have raised an objection.

When neces-
sarily avoided.

Order of the
examination of
witnesses,
in chief;

953. A witness, after being sworn or making affirmation, [§443-452] is first examined [§954] by the party producing him, which is called his *direct examination*, or his *examination in chief*: he may then be *cross-examined* [§970] by the adverse party (the prisoner having the option of deferring his cross-examination to the close of the prosecution); the party, who called him, may then examine him on such fresh matter as may have been elicited by the cross-examination, which is called the re-examination; [§981] and, finally, the court put such questions as they may deem expedient.(1)

cross-examined;

re-examined;
examined by
court.

All witnesses
except prosecu-
tor, examined by
question and
answer.

954. The form of proceedings, appended to the Queen's Regulations, points out that the examination of witnesses should be conducted by means of question and answer. The

(1) See before, § 572-580.

case of the prosecutor being a witness for the prosecution is a necessary exception. [§ 571(6)] Witnesses, immediately on being sworn, were sometimes directed by the president to relate what they know about the charge. In such cases, the witness, either to connect what he has to offer, from the influence of feeling or from other cause, was often betrayed into *hearsay*, and induced to make statements which could not be legally received in evidence. It therefore became necessary, in recording the evidence, to distinguish between the parts of the witness's statement which could be legally received, and the parts which could not; and although the duty might have been ably performed by a judge advocate or president, yet impressions were sometimes made upon individual members, which the admissible parts of a witness's statement was not calculated to convey; whereas in the ordinary mode of question and answer illegal questions may be thrown out, and answers wide of the question immediately objected to. From these causes, though possibly more tedious in the first instance, the course, now rendered imperative, will be found to secure greater precision in the admission of evidence, and in the end to save the time of the court by excluding extraneous matter, or by operating as a check to its admission.

Advantage of the course now prescribed by regulation.

955. Leading questions or such as admit of a direct answer, yes or no, as to a material fact, or which suggest to a witness how to answer, are not permitted on the examination in chief, or on a re-examination. But leading questions which are purely introductory, or refer to matters which are undisputed, and the answers to which are not material to the establishing of the point in issue, are not open to objection, and a resort to them often saves the time of the court, by preventing a diffuse preliminary interrogation. Suggestive assistance, when an omission is evidently caused by a want of memory, as in the case of names, or where a witness is required to enumerate in detail a variety of items, is also allowed, in the discretion of the court, according to the circumstances in each particular case. It is impossible there should be precise rules, but it is evident there must be many cases, which do not fall within the principle of the prohibition of leading questions, and where the court must exercise its discretion in relaxing the general rule. (2) Where

Leading questions not permitted in examination in chief,

unless introductory,

or suggestive questions,

not liable to be objected to.

Leading questions to an unwilling witness,

a child ; or unintelligent savage.

Parole evidence only as to facts immediately within the personal recollection and knowledge of witness, which may be tested by further questions or on cross-examination.

Exceptions ;

belief of witness.

Opinion of experts

receivable in evidence,

a witness is evidently in the interest of the opposite party, and is reluctant or unwilling to speak the truth, an examination in chief is permitted to assume something of the form of cross-examination, by the admission of leading questions. (3) So also the court will allow pointed or leading questions to be put to a child ; (4) and the same applies to an unintelligent witness, and especially in the case of native witnesses in some of the colonies, whose attention cannot otherwise be called to the matter under investigation, or who do not readily understand the object of their examination.

956. The general rule is that a witness can be examined only as to facts which he personally recollects, and which became known to him by the evidence of his senses,—what he has himself seen, heard, &c. This is implied, even if not expressly asserted, by the witness, and he may be questioned, or may be cross-examined as to the sources of his knowledge of any fact, and his reasons for recollecting it. But, even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. For example, it is the constant practice to receive in evidence a witness's belief of the identity of a person or thing, or of the fact of a certain handwriting being the writing of a particular person, though the witness will not swear positively to these facts. It has been decided that a witness, who falsely swears he thinks or believes, may be convicted of perjury equally with the man who swears positively to that which he knows to be untrue. (5)

957. A further exception arises in cases where scientific or professional men are examined as to matters of opinion. The opinion of a witness, generally speaking, is not evidence. He must, as above stated, depose to facts within his personal knowledge, and these facts the court weighs and applies by the judgment, individual and collective, and by the professional knowledge, of the members. (6) Yet, on questions touching a particular science or art, evidence need not, and

(3) Taylor, 1214.

(4) Taylor, 1215.

(5) Taylor, 1225.

(6) As an illustration of this principle,—a witness (as has been pointed out by official authority) may not, on a trial for desertion, "characterize" the prisoner's absence "as desertion." This, it may be observed, is *matter of*

inference, and precisely the point which it rests with the court to determine according to the evidence. The examination should be confined to the fact of the prisoner's absencing himself, and to such other facts, relevant to the charge, as may be within the *knowledge* of the witness.

from the nature of the case often cannot, extend beyond opinion and belief, and the witness is therefore permitted to give his opinion, as a surgeon concerning the cause of death or the state of a patient, in which case he is always questioned as to the best of his judgment, opinion, or knowledge. On a trial where insanity is set up as the defence, a surgeon may be asked, whether such and such facts (proved by other witnesses) are symptoms of insanity. But it has been doubted by several of the judges if it could be asked, whether, from the other testimony given in the case, the act with which the prisoner was charged was an act of insanity, as that was the very point to be decided by the jury. (7) The judge advocate general, on the trial of Colonel Quentin, remarked: "Every question is admissible of a military man, where it is founded on local knowledge or circumstances which are not within the reach of all the members of the court; but where it is merely a question of military science, to affect the officer who is undergoing his trial, it is obvious that the court is met for no other purpose but to try that; and that they have before them the facts in evidence, on which they are to ground their conclusions." (8)

as to questions touching a particular science or art; of medical men,

in cases of insanity;

questions arising from special information of witness.

958. In cases affecting the conduct of the accused, either as to deportment or language, it is not only proper, but often necessary, to require a witness to declare his opinion, because such opinion may be derived from the impression of a combination of circumstances occurring at the time referred to, difficult, if not impossible, fully to impart to the court; but it would be manifestly improper to draw the attention of

In cases affecting conduct, how far opinion may be required;

(7) *Rex v. Haswell, Russ. & Ry.* 458. With reference to the case of *Reg. v. McNaughten*, which has been elsewhere more particularly adverted to [§ 590], the judges were asked:

"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, whether he was acting contrary to law, or whether he was labouring under, and what, delusions at the time?"

On which question the answer was: "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, which are admissible. But when the facts are admitted or not disputed, and the question becomes one substantially of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on, as a matter of right."

—*Journals, H.L. lxxv. 401, ff.*

(8) *Printed Trial, p. 48.*

as to opinion
of witness.

Questions
involving
opinions
depending on
occurrences,

as to engineer-
ing or the
effect of
artillery,

as to the
seaworthiness
of a ship.

Witness may
refer to his
notes made at
the time of
transaction ;

a witness to facts, either derived from his own testimony or that of another witness, and to ask his opinion as to their accordance with military discipline or usage, because the court, being in possession of facts, are the only proper judges of their tendency. On the trial of Lt. General Whitelocke, questions involving opinions, formed at the period to which the facts related, were decided by the court as admissible, after the due consideration of a protracted argument on the case in writing, put in by the prisoner. (9) These questions depended on the particular knowledge of the witness from his presence on the spot, and at the time of the occurrence of the circumstances, to which the question had reference. They were not grounded on an hypothesis framed so as to elicit an opinion depending on military science generally. Such questions ought never to be admitted. It is clearly the duty of the court to examine as to facts, and to apply those facts by their own professional knowledge and experience, to the solution of the question in issue, and not to admit the opinion of a witness when, by more patient investigation, they could acquire such information on the subject, or such a detail of facts, as might render them competent to form a correct judgment. It is, however, perfectly proper to put questions involving opinion, to an engineer, as to the progress of an attack, or to an artillery officer, as to the probable effect of his arm, if directed as assumed: these questions though having reference to military science, are not of that nature to be presumably known to each member of a court martial. So in a civil court, a shipbuilder has been admitted as a witness to give his *opinion* as to the seaworthiness of a ship, on *the facts stated* by others. (10)

959. No witness is permitted to read his evidence, or to refer to notes of evidence he has already given, but to refresh or assist his memory, and particularly with reference to dates, numbers, sums of money, or any complicated mass of facts, he may make use of, and occasionally refer to, a written memorandum or entry in a book made by himself at the time, or recently after, when he had a distinct recollection of the fact; or made by another, under his direction, or with his cognizance, and examined by him whilst the

(9) Printed Trial, pp. 463, 477, 478.

(10) 1 Phillips, 522.

fact was fresh in his memory. (1) A witness, however, is always required to swear positively as to the fact; or that he has a perfect recollection that the fact was truly stated in the memorandum or entry at the time it was written. If, on referring to a memorandum not made by himself, he can neither recollect the fact, nor recall his conviction as to the truth of the account in writing when the facts were fresh in his memory, so that he cannot speak as to the fact, further than as finding it noted in a written entry, his testimony is objectionable, as hearsay; the witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (2) The opposite party in every case is permitted, and has a right to inspect the writing referred to by a witness for the purpose of reviving his memory, so that his testimony depends upon his inference from his memoranda; and he may cross-examine the witness upon it. (3)

or notes made by others, under his direction, if when examined he has an independent recollection of the facts,

opposite party may inspect such memoranda.

960. Every witness, whether on his examination in chief, or on the cross-examination, has a natural right to explain and make clear the evidence which he has given. If any doubt should arise after his examination has closed, the court may call upon him to make such explanation, or to reconcile answers, which may appear inconsistent. (4) Such explanation can be entered upon the proceedings only as an addition to the evidence previously recorded; any discrepancy, for the sake of justice, and for the information of the officer whose duty it is to confirm the sentence, must still appear, [§ 482] although such apparent contradictions may have been satisfactorily explained. During or previous to cross-examination, it would be manifestly incorrect to place a witness on his guard, by allowing his previous deposition to be read to him, or permitting him to refer to any notes, or (5) a newspaper, or other report of it; but, for the purpose of explanation, courts martial afford all possible facilities; and in this view and for the purpose of giving an opportunity of correcting [§ 578] any accidental mistake or omission on the part of the judge advocate, or the officer who may be writing the

CORRECTION BY WITNESS.

Witness may explain,

but previous entries not to be erased.

(1) 2 Phillips, 483. Taylor, 1218.

(2) 2 Phillips, 483.

(3) 2 Phillips, 481. Taylor, 1221.

(4) Lt. Col. Crawley's Trial, Q. 1303.

(5) This of course does not apply to the case of a witness's examination in

chief being read at the request of the party who is cross-examining him in order to bring out a contradiction in his statements, which he may then be called on to reconcile.—*Lt. Colonel Crawley's Trial*, Q. 237.

Explanation treated as examination in chief.

PRIVILEGE OF WITNESS IN REFUSING TO ANSWER.

Courts martial are bound by the law of England to maintain the privilege of a witness,

in all cases where the answer might tend to criminate or suggest a link in proof against himself.

Accomplices cannot be examined against their consent, but in the event of a breach of contract, are not protected from the consequences of their own acts.

May claim the protection of the court at any stage of the enquiry.

proceedings, it is the usual practice to read over to a witness, (invariably, if either he or the parties desire it,) the whole of his deposition before (6) he leaves the court. (7) The explanation by a witness is considered in the light of an examination in chief, and he is subject to be cross-examined, and re-examined by the party originally calling him, with reference to any fresh statement he may make.

961. The policy of the law has been very much contested, but it has been recognized by a proviso in an act of parliament, [§ 913] which was emphatically pronounced to embody the old common law of England by the unanimous judgment of all the judges in the court of crown cases reserved. [§ 917(3)] Hence, as observed [§ 335], it is characteristic of our judicial system, and in our military no less than in our civil courts, that however relevant the question may be to the matter under enquiry the humanity of the English law refuses to compel any man to criminate himself or to give information, which, though it could not be used against him in evidence, yet might supply a link in a chain of testimony, or lead to the obtaining of proofs in support of a charge against himself. (8)

962. Accomplices, therefore, cannot be examined without their consent; but, as they are frequently admitted to give evidence against their associates in crime under an express or implied promise of favourable consideration, or of pardon, they are in so far obliged to give evidence, that if, when sworn as witnesses, they refuse to give full and fair information, "they may be convicted on their own confession." (9) But even accomplices in such circumstances are not required to answer, in their cross-examination, as to other offences. (10)

963. It had been held that where a witness, after having been cautioned that he was not compellable to answer a question which may criminate him, chose to answer at all, he might be compelled to answer everything relative to that transaction; but on consideration by the whole of the judges, it has been held by a majority that a witness after having

(6) This was introduced into the Regulations in 1868—Q.R., App.B (3). *Instruction.*

(7) After leaving the court, witnesses occasionally apply to be recalled in order to correct or explain their recorded testimony, such evidence would, in many cases, be received with suspicion, and the wit-

ness, as it is almost superfluous to observe, would in every case be liable to be questioned in order to elicit whether such after-thought were spontaneous, collusively suggested to him, or otherwise.

(8) Taylor, 1260.

(9) 1 Phillips, 92.

(10) 2 Phillips, 492. § 998.

answered some of the questions may stop at any moment of the enquiry, and claim his privilege. (1)

964. The Articles of War (A.W. 162) prohibit the use of reproachful words to witnesses, and the court is bound to stop any question which appears to be put for purposes of insult or annoyance, or which, though otherwise proper, is put in a needlessly offensive form. The law moreover protects a witness in not answering questions,—put to him for the purpose of impeaching his credibility and therefore only indirectly bearing on the charge,—as may have a direct and immediate [§ 979] tendency to degrade him by disclosing his infamy or turpitude; but—although the court may appeal to the questioner not to annoy him unnecessarily—(2) “if the transaction as to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character.” (3)

Witness protected from insult.

Privilege in not answering questions degrading to the character of the witness, and not directly relevant to the matter before the court.

965. Witnesses may be asked on cross-examination, for the purpose of testing their character and thereby their credit, whether they have been convicted for felony or misdemeanor. The law had been that, for the reproach of crimes which are purged, it should not be put upon a witness to answer a question whereon he will be forced to forswear or disgrace himself; (4) but, since 1865, if witnesses do not admit the fact, proof of their conviction may be given. [§ 979] “Persons have been *excused* from answering, whether they have been committed to bridewell as pilferers or vagrants, &c. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable.” (4) So on a trial for rape, the woman is not obliged to answer, whether or not she has had criminal connection with another man; but if she does answer and denies it, the man cannot be called to contradict her, because that not only involves a collateral issue, [§ 966(7)] but also an enquiry into matters as to which the woman might be wholly unprepared, and so might work most unjustly. (5) The prisoner may ask, whether he has had connection with her before the alleged rape, and produce evidence of such previous intercourse, if she denies the fact. (6)

Examination as to former offences and committal to house of correction on suspicion.

Rule on trials for rape.

(1) 2 Phillips, 489, 491. Taylor, Howell's St. Tr. 534. 2 Phillips, 1269.

(2) Law Reports, 8 Q.B. 475, per Blackburn, J., in *Sticks v. Ellis*, 17th June, 1873. (5) R. v. Holmes, Law Reports, 1 Crown Cases Reserved, 336.

(3) 2 Phillips, 494; so Taylor, 1265. (6) 1 Phillips, 505. Evidence may be given that the woman is a common prostitute, not as being relevant to

(4) By Chief Justice Treby, 13

Questions
tending
to criminate
or degrade
a witness may
be put, but the

answer if
made, conclu-
sive.

Witness is
required to
answer all
other legal
questions, and
cannot refuse
to answer
on the ground
of a civil action
or debt.

This privilege
is that of
the witness;

witness may
waive it.

All questions
entered on
the proceed-
ings whether
answered
or not.

966. It would seem that the question, whether witnesses are bound to answer other questions to their own disgrace, has not yet undergone any direct and solemn decision. If the witness, although not compellable to answer, chooses to give an answer from a desire to exculpate himself from the imputation of crime, the party who asks the question will be bound by the answer and cannot be allowed to contradict it by evidence, except to prove a previous conviction. (7) In many cases the object of asking the question is gained by the objection being raised, as the inference would ordinarily be natural, that the answer if given would be unfavourable.

967. All other questions, which may be *legally* (8) put, the witness is *compellable* to answer: even where the result of his answer might be to subject him to a *civil* suit. The 46 Geo. 3, c. 37, declares that a witness cannot refuse to answer a question relevant to the matter in issue, the answer of which has no tendency to accuse himself, or to expose him to penalty or forfeiture, by reason only that the answer to such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit.

968. It is not for the party calling the witness to suggest an objection to the question, nor to support it when it has been raised by the witness himself. The privilege of *not answering* is the privilege of the witness, and not of the party in whose behalf he may have been summoned, and therefore he may persist in waiving it, and, if he choose to answer, his answer must be received in evidence. (9)

969. The questions, whether answered or not, should be entered on the proceedings. When the witness claims the privilege of not answering, it is for the court to decide whether the question is within the exception. Courts martial may also in their discretion interpose by apprising a witness, at the time the question is put to him, that he is not bound to answer. Such interposition ought in every case to be noted on the proceedings for the information of the the issue, for a rape may be committed on a prostitute, [§1141n] but as going to the credit of the witness.

(7) 2 Phillips, 501. "The court is not a court to try a collateral question of crime, and it would be unjust, if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence that may be produced to charge him?

There is no possibility of a fair and competent trial, upon that subject, and therefore in no instance is it done." By Lord Ellenborough in *Watson's case*.—*Id.* & 32 Howell's State Trials, 490. See G.O. § 813n.

(8) As to questions which the law will not permit to be answered, see before, § 894, 929-932.

(9) 2 Phillips, 490.

confirming authority, as also when the witness makes the claim, (1) and whether he was required to answer or not. (2)

970. When the examination in chief of a witness has been closed, the other party has a right to examine him; and, at courts martial, this right on the part of the prisoner is carefully guarded, and in every case where he does not cross-examine a witness for the prosecution, it is now required by the regulations (3) that a statement that he "*declines*" to do so should appear on the proceedings. The prisoner also, as before observed, [§ 577] may defer his cross-examination. It may also be remarked that great discretion should be exercised by courts martial in rejecting questions proposed by the prisoner on the cross-examination of witnesses for the prosecution, lest there should be a miscarriage of justice. In some cases in India questions put by the prisoner in cross-examination were "refused by the court on the ground of their being irrelevant," and "the whole trial has been subsequently upset in consequence." (4) In the case of Lieut. J. E. Perry, 46th Regiment, tried at Windsor in 1854, the court decided that a question should not be put in cross-examination by the prisoner. "The deputy judge advocate general, in the absence of the judge advocate general, being of opinion that the prisoner had been thereby precluded from putting a question which was legally admissible and relevant to the issue, humbly submitted that Her Majesty should be pleased not to confirm the proceedings. For the above reason Her Majesty was graciously pleased not to confirm the proceedings of the court." (5)

971. Cross-examination is justly regarded as a most efficacious safeguard of truth, and the opposite party is entitled to test the accuracy of the evidence in chief by every means in his power. The opportunities which a witness has had of ascertaining the facts to which he testifies; his grounds

CROSS-EXAMINATION.

Right of prisoner specially guarded

by regulation, and vindicated by quashing the proceedings of courts martial, which had not allowed the full exercise of his legal right.

Case of Lieut. Perry.

Sentence of dismissal not confirmed.

Truth best tested by searching cross-examination.

(1) It is to be feared that, in some instances, from a tenderness to the feelings of persons, not themselves on their trial, this may have been done with the unintentional effect of preventing a legitimate exercise of the right of cross-examination. A sense of fairness to all parties would seem to point out that this course ought never to be adopted where the unwillingness or hostility of the witness is evident, and he is sufficiently conversant with the practice of courts mar-

tial to be aware of his privilege.

(2) It has been elsewhere [§ 933] observed that questions tending to injure and degrade third persons, not connected with the trial, are not permitted.

(3) Q.R. App. B(3). See § 1309.

(4) Mr. Headlam, 2nd Report Courts Martial Commission, 2nd April, 1868, Q. 1306, 1308. See also Mr. Mowbray's letter. 6th March, 1867 [§ 576].

(5) G.O. 9th August, 1854.

for forming the opinion he has given ; his ability to acquire the requisite knowledge ; his powers of memory ; his situation with respect to the parties ; any conversations he may have had, or any letters, or statements in writing which he may have written or received in reference to the subject of his evidence ; [§ 977-8] his character, his motives, his inclination and prejudices, may all be severally examined and scrutinized. He may be required to reconcile conflicting answers, (6) and he may be reminded in the most pointed way of any circumstances he may have forgotten or concealed. In cross-examination, questions leading directly to the point are permitted, the object being to sift the evidence and try the credibility of a witness ; and where witnesses betray zeal for the party calling them, or a backwardness in speaking impartially, there is no fear of extending this licence too far. On the other hand, should the witness under cross-examination have evinced a backwardness to declare the truth on his examination in chief, and have betrayed a feeling for the opposite party, the cross-examination ought to be restricted. (7)

Great latitude allowed in the mode of putting questions.

Importance of not restraining this latitude.

972. Mr. Tytler, misled by the law of Scotland, would restrict cross-examination to "relevant questions, arising from, and relative to, the evidence already given ;" (8) but, in many cases, this would have a tendency directly opposed to the development of truth, and the detection of falsehood ; and would defeat one great end of cross-examination as affording an opportunity for testing the credibility of a witness.

Suppositions facts.

973. Mr. Peake says, that a counsel cross-examining may, for the purpose of trying the credit of a witness, suppose facts apparently connected with the cause, which have no existence but in his own imagination, and ask the witness if they did not happen. No mischief can arise from this course of examination ; for if the witness is determined to speak nothing but the truth, he will deny everything so suggested, and the testimony of every other who is called will confirm him : but it frequently happens, on the other hand, that witnesses who have entered into a conspiracy to defeat justice, and, having made up their story together, agree

(6) The court will direct the witness's evidence to be read from the proceedings for this purpose.—Lt. Col. Crawley's Trial, Q. 239.

(7) 2 Phillips, 472. Taylor, 1240.

(8) Tytler, 245. The Scotch law was assimilated to the English by the 3 & 4 Vict. c 59, s. 4.

on the main features of the case—when examined out of the hearing of each other—break down, and are proved utterly unworthy of credit by their variations and contradictions in little circumstances as to which they came unprepared. (9)

974. But though it may be expedient to permit questions in cross-examination which involve supposititious facts or matter not previously in evidence, where collusion or conspiracy amongst witnesses is suspected, it is necessary to guard against the extension of the principle to other occasions, as a frequent result would be needlessly to occupy the time of the court,—to protract the proceedings, often to the detriment of the service,—and to weary and annoy the witness. A witness under cross-examination may, however, always be questioned in explanation of facts given in evidence by any preceding witness, and also as to the motives which might influence him in giving testimony, or as to the circumstances in which he might have been brought to appear as a witness. For instance, it has been decided to be not irrelevant to cross-examine a witness as to whether in consequence of being charged with robbing the prisoner he had not said that he would be revenged upon him; and, if the witness should deny having used such a threat, evidence may be given to contradict him.

Caution as to extent of cross-examination;

how far, always to be permitted

to explain facts

to prove animus.

Examples of evidence to contradict statements.

975. Considerable latitude is allowed in respect to the relevancy to the matters in issue of questions which may be put in cross-examination, where the tendency of the questions is to affect the credit of the witness. Although no question respecting any fact irrelevant to the issue can be put to a witness, for the mere purpose of contradicting him, he may be asked, although not always required to answer, [§964] questions affecting his own character, (1) and consequently his credit, which have no relation to the matters in issue. But a witness should not be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matter in issue, and could in no way affect his credit; and still less can he be examined as to such facts for the purpose of contradicting him by other evidence, and in this manner discrediting his testimony. (2) And if the

Cross-examination, how far limited as to relevancy,

in damaging credit of witness.

(9) Peake, 197.

(1) 2 Phillips, 467-8. Taylor, 1242.

(2) See before [§813*], a General

Order, promulgating the Queen's remarks, on occasion of the neglect of this rule.

witness answer such irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony. In the pointed language of Chief Baron Sir F. Kelly, "If a question be put in cross-examination to a collateral point, the answer must be taken for better or worse." (3) To do otherwise would render an enquiry, which ought to be simple and confined to the matter in issue, intolerably complicated and prolix by causing it to branch out into an indefinite number of collateral issues. (4)

General rule as to contradicting answers to questions for the purpose of testing a witness's credit,

or his impartiality.

Statutory rules provided by Mr. George Denman's act, 1868,

as to proof of contradictory statements of adverse witness,

in the case of a preliminary examination or otherwise.

976. The general rule in these cases is thus laid down by Mr. Pitt Taylor. "If the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot." (5) The question then arises what matters are or are not relevant. In addition to what has been before said, [§813] it may be observed that answers as to the previous conduct of the witness, unconnected with the parties or the matter in issue, except in the case of an actual conviction, [§979] must be taken as conclusive. On the other hand, whether a witness has expressed hostility towards the prisoner, or attempted to suborn persons to give false evidence against him, are points which are held to be relevant to the guilt or innocence of the prisoner, as to which therefore, after the witness has denied the fact, he may be contradicted. (6)

977. The legislature has interposed with a definite law, instead of the ruling of the unwritten law on several of these points. The 28 Vict. c. 18, which applies to all courts of judicature, "criminal as all others," including courts martial, provides, (*sec.* 4) "If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." This provides for a witness for the

(3) 18th Nov. 1871. Law Reports,
1 Cr. Cases Res. 336.
(4) Starkie, 200.

(5) Taylor, 1245.
(6) Taylor, 1247 and 1249.

prosecution being cross-examined as to statements made when the crime was investigated by the commanding officer. If such statements were in respect to some fact relevant to the charge, the prisoner may contradict him by the evidence of the officer who investigated the charge, or other witness who was present. (7)

978. By the same act (*sec. 5*), "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, [the court martial] at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit." (8)

Cross-examinations as to previous statements in writing.

979. By *sec. 6*, "A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction."

Proof of previous conviction of witness may be given.

980. When a witness has been once sworn to give evidence, though it be only as to character (9) or to prove (1) handwriting, though he gives no testimony at all for the party calling him, the opposite party may cross-examine him. (2)

Witness sworn, and not examined, may be cross-examined.

981. The cross-examination being ended, the party who

RE-EXAMINATION:

(7) A district court martial having informed the prisoner that he was not entitled to such evidence, where he had not cross-examined the witnesses for the prosecution as to their former statements, it was pointed out that the court should have offered the prisoner the opportunity of cross-examining the witnesses [i.e. recalled them] in order to allow the statements being admitted in evidence.—J.A.G. 17th Sept. 1866.

(8) It had previously been the law that the witness could not be asked,

whether he had written such and such a letter without having been first shown the letter.

(9) This point was raised with reference to the examination of Colonel Shute at the Aldershot court martial and the cross-examination was allowed.—Lt. Col. Crawley's Trial, Q. 321.

(1) If a person be called merely for the purpose of producing a written instrument belonging to him, which is to be proved by other evidence, he need not be sworn.—2 Phillips, 466.

(2) 2 Phillips, 467. Taylor, 1241.

Re-examination.

confined to
the points
raised on cross-
examination

as to former
statements,

and as to
new facts.

IMPEACHING
CREDIBILITY
OF WITNESS,

by direct
testimony,

by cross-
examination ;

by previous
conviction,

called the witness has a right to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions, used by the witness on cross-examination, if they be in themselves doubtful; and also, an explanation of the motive by which the witness was induced to use those expressions. He has no right to go further and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. Mr. Phillips observes: as the object of cross-examining a witness respecting former statements, supposed to have been made by him, is to impeach the truth and credit of his testimony; so, on the other hand, the object of the re-examination is to give him an opportunity of showing the consistency of his statements and of vindicating his character. If the witness has been cross-examined as to facts which would not have been admissible on the examination in chief, the other party has a right to examine as to the evidence so given. (3)

982. The credit of a witness may be impeached by directly disproving the facts stated by him if material to the issue; or by cross-examination; or by the proof of his conviction for some crime; or, by adducing general evidence that he is unworthy of being believed on oath, [§983] or by the proof of his having done or said that which is inconsistent with his statements in this particular instance. As to discrediting the testimony of a witness by direct evidence bearing on the charge, nothing need here be said. The subject of cross-examination has been previously considered. [§970-9] With respect to putting in proof the certificate of conviction for a crime with the view of destroying the credit of a witness, it may be observed that, although Lord Denman's act [§912] has had the effect of restoring the competency of a witness, who has been convicted of an infamous crime, it cannot operate to retrieve his credibility. The proof of the conviction of crime may more or less influence the degree of confidence to be placed in his testimony, and although in consequence of the difficulty of producing legal proof, witnesses are not often discredited in this formal manner, cross-examination as to the fact of previous conviction

tions produces all the effect of discrediting him which can be desired, and equally serves to warn the court to be cautious in receiving his testimony.

983. The credit of a witness may be impeached by the deposition of other witnesses as to his general character, but not as to particular parts of his conduct, or as to facts not relevant to the issue; for, though every man is supposed to be capable of defending his general character, it is not likely that he should be prepared to answer to particular facts without previous notice, and the administration of justice would become impracticable, if an enquiry were allowed to branch out into such collateral issues. The regular mode is, to enquire whether the witnesses have the means of knowing the witness's general character, and whether, from such knowledge, they would believe him on his oath. (4) The party whose witness is impugned may cross-examine as to the grounds for such general opinion given, or the opportunities which witnesses may have had for coming to such conclusions, or as to their own character and conduct; these questions being replied to generally, a further cross-examination into particular instances is inadmissible. The party whose witness is impeached may also bring fresh evidence to support the character of his own witness for integrity and truth, (5) or to attack the general character of the impeaching witnesses. (6)

984. The credit of a witness cannot be confirmed by proof that he has given the same account before, (7) but it may be impeached, even by the party producing him [§985], by proof that he has made statements on another trial, or out of court, on the same subject, contrary to what he swears at the trial, provided he has been previously examined as to such alleged statements, and provided that such alleged statements are material to the matter in issue [§977-8]. A letter written by him, or a deposition signed by him, may be used to contradict his testimony, without the letter being shown to him. [§978(5)]

985. A party cannot impeach the credit of his own wit-

by deposition
to general
character,

but not as to
collateral and
irrelevant
facts.

RE-ESTABLISHED
CREDIT OF
WITNESS
by examination,

or evidence of
his good
character.

Impeaching
by statements
out of court.

Party may not
directly

(4) 2 Phillips, 504. Taylor, 1273.

(5) Taylor, 1277.

(6) 2 Phillips, 504. Taylor, 1275.

(7) Starkie, 253; except in those

cases where an immediate complaint
of some personal injury has been
made. See § 862.

impeach the credibility of his own witness, but may bring evidence to contradict him, or discredit him as provided by

28 Vict. c. 18.

Trifling disagreements in testimony,

as to minute facts,

and in witnesses' impression as to the same transaction, are consistent with substantial truth.

Cause of venial discrepancies in evidence.

ness by general evidence of bad character; (8) but "in case the witness shall in the opinion of the judge," (or court martial) "prove adverse," it is enacted by Denman's act, already quoted [§ 977], (*sec.* 3) that he may "contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

986-9. In weighing the conflicting testimony of witnesses, it ought not to excite surprise that witnesses of fair reputation should differ as to minute points in their relation of facts. An exact agreement in the narration of minute particulars would rather create suspicion of previous contrivance and conspiracy. The non-agreement of witnesses, therefore, on points which are not of a prominent and striking nature, may in many cases be no impeachment of their general credibility, and ought to be carefully distinguished from wilful and corrupt misrepresentations. If venial discrepancies in testimony are met with, relating to positive facts, much more are they to be expected, when witnesses depose rather as to the impression made upon their minds, than as to facts, as on trials arising out of quarrels, or disrespectful conduct to superiors. The words actually employed, independent of deportment, voice, and gesture, must often very imperfectly convey an adequate conception of the matter, of which it is important for the court to be informed, and as regards which it is incumbent on them to decide. This variation in evidence (arising from the predisposition of the minds of witnesses to be impressed by, or to retain, facts) is particularly likely to occur, when by the lapse of considerable time, and probably from conversations relative to the affair in issue, the impression, at first loosely admitted, becomes confused, if not warped, by the preference which a witness, without any culpable feeling, may entertain for one side or the other.

(8) "This would enable him to destroy the witness if he spoke against him and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit, if he spoke against him."—Buller, N. P. 297.

CHAPTER XXIII.

OF ADMISSIONS BEFORE COURTS MARTIAL, AND CONFESSIONS
BY PRISONERS.

990. THE only admissions, (as distinguished from confessions by prisoners), which it is of importance to notice with reference to the practice of courts martial, are those which may be made in open court by the parties before the court. These are received in certain cases (more especially, if not exclusively, applying to officers) as conclusive, and, unlike a plea of guilt, the legal effect of which will be considered hereafter [§ 1005], are entered on the proceedings to the exclusion and in the place of more formal evidence.

ADMISSIONS IN
OPEN COURT,

by officers,

and received in
lieu of formal
evidence.

991. The orders of the army require that notwithstanding a prisoner may plead guilty, the court should receive such evidence as may afford a full knowledge of the circumstances [§ 553-4], but the spirit of this order in no way interferes to prevent courts martial from continuing to receive admissions as to collateral or comparatively unimportant facts, not involving criminal intent, which are not in dispute, but which it may be required to prove either on the prosecution or the defence. (1) It is the practice to allow either party to admit the authenticity of orders, or letters, or the signature of a document, or the truth of a copy, in cases where such writings are receivable when proved; or that certain items in an enumeration of stores, or in an account, are correctly stated; also that a promise or permission to a certain effect, or a certain order, was actually given, or a certain letter was sent or received on a certain day, and in other similar cases where admissions may expedite the

Such admissions
are confined to
comparatively
unimportant
points,

as to the
reception of
documentary
evidence

or collateral
facts, merely
requiring
formal proof.

(1) It is believed that, although in strict law the two cases must stand upon exactly the same ground, it would not accord with the practice of the service that any admission should be

suggested to a prisoner, however true in point of fact, unless the prosecutor was prepared with sufficient and available evidence to prove the point.

proceedings, and do not go to the merits of the matter before the court.

Confessions,

992. The confession of a prisoner in a criminal case is received in evidence upon the presumption that a person will not make an untrue statement, or admission militating against himself. But as there may not unfrequently be motives of hope and fear operating to this end—and because the confession itself is in many cases liable to mis-construction, or to be mis-reported from ignorance, inattention or malice—statements by prisoners are often excluded from being given in evidence, and, when they are received, they should always be received with caution by the court. (2)

when admitted
as evidence,

993. Confessions of prisoners, if voluntary, whether made before apprehension or after, whether reduced into writing or not, if satisfactorily proved, (3) may be given in evidence. If such voluntary confessions are deliberate and express, and are not improbable in themselves, they are entitled to great weight, and may be legally sufficient for a conviction; but “this has been gravely doubted” by approved writers on this branch of the law. (4) At all events a confession is not conclusive evidence against a prisoner, and when it involves a matter of law, is to be received with more than usual caution. (5)

of matters
of fact,

not of matter
of law.

Confessions,
in many cases,
as laid down
by Sir M.
Foster, ought
to be of small
effect in proof
of crime.

994. A confession is by law admissible in evidence, even when made in the course of conversation, and when the party may not be upon his guard and apprised of its danger; but, in the words of Mr. Justice Foster, “Hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured: words are often mis-reported, whether through ignorance, malice, or inattention—it mattereth not to the defendant—he is equally affected in either case: they are extremely liable to mis-construction, and withal this evidence is not, in the ordinary case of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted.” (6)

(2) 1 Phillips, 402.

(3) A single witness is in all cases sufficient in law, except in those cases where the overt act or offence must be proved by two witnesses (§ 868), when the confession must be proved

by two witnesses.

(4) Taylor, 774-5. Roscoe, 38.

(5) 1 Phillips, 406. See § 189(5), 957(6).

(6) Foster, 243.

995. Any threat or promise, or hope of pardon, held out or sanctioned by being made in the presence of, a magistrate, or other person in authority, or concerned in the charge, will prevent the admission of any consequent confession; but a confession is receivable in evidence, if it has been made in consequence of promises or threats by a person, who has nothing to do with the apprehension, prosecution, or examination of the prisoner. (1) The law presumes that, under a threat or promise, a prisoner may confess himself guilty of that of which he is innocent, and, therefore, it excludes his confession; but if confession, though extorted, lead to the discovery of circumstantial evidence, as of the prisoner being seen near the place, a murdered body or stolen goods being concealed, it is no objection to the fact being given in made evidence, that the discovery was in consequence of information obtained by undue inducements. (2)

Confessions made under inducements of hope or fear are not admissible.

Must be voluntary.

996. A confession made by an approver, or one who has approved of and consented to a crime, in hope of being thereby permitted to turn Queen's evidence, is not a *voluntary* confession, and is, therefore, inadmissible: (3) but it seems that the confession of a person admitted as Queen's evidence may be received against him, if he refuses to give evidence on the trial of his confederates in crime. (4) A prisoner, who had made a confession to a constable in consequence of a promise, was taken before a magistrate, who, knowing what had taken place, cautioned him against making any confession before him; the prisoner, notwithstanding, did make a confession to him, which confession was admitted in evidence against the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he *might*, therefore, *have acted* under an impression that, after having once acknowledged his guilt, it was useless to retract. (5) But such subsequent admission ought to be rejected unless there were "good reason to presume that the delusive hope or fear

Confession by Queen's evidence,

receivable in case of a breach of contract,

or after caution by magistrate

if not influenced by hope or fear;

(1) 1 Phillips, 411. The rule of exclusion extends to all cases, where the prisoner has been told that it would be better for him if he did confess, or worse for him if he did not, or any language to that effect has been used; and to all statements made by a prisoner which may affect

him criminally though in terms they charge another person, or purport to be a refusal to confess.

(2) 1 Phillips, 416. Taylor, 806.

(3) 2 Leach, 637.

(4) 1 Phillips, 413, § 982.

(5) Rex v. Howes, 6 C. & P. 404.

which influenced the first confession has been effectually dispelled.”(6)

need not be spontaneous ;

may be given from religious considerations ;

or in answer to questions,

or when drunk.

Deception does not exclude prisoner's letter obtained by means of it,

nor exclude a verbal confession.

Confessions to legal advisers are privileged communications.

997. A confession resulting from the state of a prisoner's mind, acted on by the exhortation of the prison chaplain, when regularly made before a magistrate, after due caution as to its probable result, and of the futility of relying on any expected favour from it, has been received, and, accompanied by corroborating proof, sentence of death and execution has followed. (7) Similar evidence might have been admitted on a military trial ; and equally so, if the confession had been made to an officer or other person. It should clearly appear that the exhortation to tell the truth, by whom ever made, was unaccompanied by any hope of favour in connection with the charge being held out or implied. A confession obtained without either threat or promise, by questions put by a police officer, is admissible in evidence, although he had, of his own authority, locked up the prisoner (a boy) without food for several hours ; (8) and where a prisoner made a confession whilst under the effects of intoxication, it was held receivable, however little weight it might have. (9)

998. If a prisoner, who is committed on a charge of felony, ask the turnkey of the gaol to put a letter into the post, addressed to the prisoner's father, and the turnkey promise to do so ; and instead of that, on receiving the letter, he conveys it to the visiting magistrates of the gaol, who forward it to the prosecutor, this letter is evidence against the prisoner, notwithstanding the manner in which it was obtained. (1)

999. A prisoner being in custody on charge of murder, a fellow prisoner pressed him to tell “ how he murdered the boy.” The prisoner put his fellow on oath not to reveal what he told him, and then made a statement of the circumstances ; it was held that this statement was admissible against the prisoner confessing. (2)

1000. It has been elsewhere observed [§ 930] that statements made to legal advisers, are privileged, but that they may be examined as to what they know apart from communications to them in their professional capacity.

(6) Taylor, 782.

(7) Rex v. Gilham, by the twelve judges.

(8) Rex v. Thornton, Moody, C. C. 27.

(9) 1 Phillips, 420.

(1) Rex v. Derrington, 2 Carr. & P. 418.

(2) Rex v. Shaw, 6 C. & P. 372.

1001. The evidence which a person gave before a committee of the House of Commons has been admitted *against him* on a trial for misdemeanor. (3) It might therefore be argued that a statement made by a person before a court of enquiry, may afterwards be admitted against him in a criminal court or on a trial before a court martial, as neither the House of Commons itself, nor any committee was at that time (4) enabled to administer an oath, and a court of enquiry does not administer an oath; but the custom of the service is decidedly against the admission of such statements against a prisoner before a court martial. During the trial by a general court martial of an officer of the Royal Marines, at Chatham, in October 1829, the judge advocate general was consulted as to whether an officer who had been a member of a court of enquiry held to investigate the subject of the trial could be examined as to any confession then made by the prisoner, and he had "no hesitation in saying that, in his opinion, to treat as a confession any thing" the prisoner "may have said or urged in the course of the proceedings referred to, would not be just or prudent, and that therefore" the officer who had been a member of the court of enquiry "ought not to be called on the particular point alluded to."

Evidence given by prisoner not on oath.

Evidence given by prisoner not on oath, whether admissible against him, in criminal courts,

or courts martial.

Admissions before courts of enquiry are not admissible before courts martial.

1002. The law is clear that when a prisoner has been mistaken for a witness and inadvertently sworn, his confession upon oath cannot be received against him; but it would seem (5) that the latest decisions would justify admissions made on oath by a person not in custody being received against him on his subsequent trial in the ordinary course of law. (6) So far, however, as the practice of courts martial is concerned, although it is not known that any official opinion has been given on the subject, it is believed that such evidence has not in any instance been received, although cases have occurred where courts martial have rejected a proposal

Examination on oath not receivable as confessions.

(3) *Rex v. Mercer*, 2 Stark. 366.

(4) This power is now given by 34 & 35 Vict. c. 83.

(5) *Taylor*, 803. *Roscoe*, 48.

(6) When the defendant, on a cross-examination in a civil action, was *illegally compelled* by the judge to answer questions tending to criminate him, it was held that the admissions so obtained could not be used against him

upon his trial on a criminal charge; and this, it would seem, "not because testimony so obtained may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man is bound to criminate himself."—*Taylor*, 805. See § 963.

to prove and use against prisoners evidence which had been given by them as witnesses before courts martial, and also where the evidence was given in proceedings before the civil power. (7)

General rule as to admissions and confessions : that what a man admits against himself cannot be taken without his explanation, and without taking what makes for him.

1003. It is a general rule that the whole of admissions or confessions must be taken together, so that what is given in evidence may be neither more nor less than what the prisoner intended. Thus, if a man says, "that he did owe a debt, but that he had paid it," such an admission will not be received as evidence to prove the debt, without being also evidence of the payment. Or a prisoner may admit killing a man, and state facts which may reduce it to manslaughter. In these, and all similar cases, the statements favourable to a prisoner, or explanatory of his conduct, cannot be kept back, but must be received, as well as what tells against him, but still this is like all other evidence, and it is for the court martial in this, as in all other cases, to decide what parts they believe to be true. (8)

Confessions not evidence against accomplice.

1004. The confession is evidence only against the person confessing, not against accomplices. (9) Several persons being charged with a criminal offence, one of them, in the presence of the others, stated before a magistrate that he himself, and one of the others, committed the offence ; the person thus charged did not deny it ; it was held that this was no evidence against him. (1)

Plea of guilt conclusive,

1005-6. A plea of guilt is a confession in the fullest degree, and will take effect on the deliberation of the court ; and before recording a plea of "guilty," the court are required to "satisfy themselves that the prisoner fully understands all the advantages he forfeits by that plea." (2) But, as elsewhere mentioned, [§ 553] it is wisely and mercifully

(7) The credit of a witness may be impeached by the proof of contradictory evidence on a former occasion.—*See before*, § 984.

(8) Lord Tenterden says, "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and have a very different tendency to what would be produced if the whole were heard ; for one part of a conversation will frequently serve to qualify and to explain the other."

(9) *Taylor*, 777.

(1) Upon trials for treasonable and other conspiracies, mutinies, and other cases where several persons have entered into the same criminal design, statements by one confederate are receivable against another, when they are in the nature of, or when they accompany acts for which all the parties are responsible ; but they are not receivable when they are in the nature of narratives, descriptions, or confessions.—*See before*, § 821-3, 861 & 864.

(2) *Q.R.App.A.p.5.*

directed, that a court martial do notwithstanding receive and report such evidence as may afford to the authority, which has discretion in carrying into effect the sentence, a full knowledge of all the attendant circumstances. A court martial, failing to receive and report such tendered evidence as may afford a full knowledge of circumstances, would, doubtless, commit a breach of military duty; but, in the eye of the law, a decision grounded on a plea of guilt may be maintained, notwithstanding the rejection of evidence; and any sentence following thereupon, if confirmed and carried into effect, and not otherwise illegal, could not expose the members of the court martial to any penalty, on any proceeding in a court of common law. The superior courts will not permit courts of inferior jurisdiction, created by statute, to adopt any rules of evidence, but such as are recognized by the law, or provided by statute. The mutiny act, by itself, and through the instrumentality of the articles of war, regulates the jurisdiction of courts martial; and the general orders for the army may, and often do, lay down rules as to the mode of conducting the proceedings; but the rules of evidence can only be ascertained by reference either to the common and statute law which is binding upon the common law courts of England, or to the express provisions of the mutiny act and articles of war.

but a court martial nevertheless is bound to investigate the charge.

CHAPTER XXIV.

OF DOCUMENTARY OR WRITTEN EVIDENCE.

Documentary
evidence
produced in
the discretion
of the court.

Minutes of
court of
enquiry not to
be called for
without con-
sent of superior
authority,

nor confidential
reports ;

but refusal
ought to be
made appear in
proceedings.

Public docu-
ments or
writings.

Private
writings.

1007. It has been before shown that the law has provided means for the compulsory production of documents, [§ 890] and that it is for the court to decide whether they are to be given in evidence or not. [§ 900] It may here be mentioned that it has been decided [§ 331] that the minutes of evidence, taken in writing before the privy council, and the proceedings of a military court of enquiry, cannot be called for in civil courts without the consent of the crown ; and in like manner, the minutes of courts of enquiry cannot be called for by courts martial, nor witnesses examined as to their contents without the consent of the superior military authority by whose order the court of enquiry was assembled. (1)

1008. So also confidential reports, or confidential letters, although they may refer to matters which a court martial may have decided to be relevant to the enquiry before them, can be produced only by consent of the superior military authority, and such consent is refused when the production of the confidential document, or an extract, is considered detrimental to the public service. Proof of such refusal must be laid before the court by the examination of a witness, or by a written communication, which is read in open court and attached to the proceedings. (2)

1009. The writings or documents which may be used in evidence are distinguished, as to the manner of proof and also as to the effect of their contents, either as *Public*, which include records technically so called ; the proceedings of the superior courts, not being records ; the journals of the houses of parliament, the proceedings of inferior and foreign courts, the Gazette, public and official books and records, and other similar documents ; or as *Private*, which must be understood

(1) See a decision by the judge advocate general, § 1001.

(2) Lieut. Col. Crawley's Trial, pp. 66, 67.

to include what in common parlance are known as official letters, as well as writings originating in private or personal transactions, accounts, receipts, &c.

1010. The contents of documents, public or private, are proved either by the production of the original, or by secondary evidence in the cases allowed by law.

Manner
of proof.

1011. Certified copies of records, authenticated by a person appointed for the purpose, as provided by several statutes relating to them, are evidence of the contents of the original upon the credit of the officer authorized to furnish it, without evidence being given of the copy having been actually examined. [§ 1028]

Public documents proved
by certified
copies.

1012. The mutiny act provides that "whenever any officer or soldier shall have been tried by any court of ordinary criminal jurisdiction, the clerk of such court or other officer having the custody of the records of such court, or the deputy of such clerk, shall, if required by the officer commanding the regiment to which such officer or soldier shall belong, transmit to him a certificate setting forth the offence of which the prisoner was convicted, and the judgment of the court thereon if such officer or soldier shall have been convicted, or of the acquittal of such officer or soldier, and shall be allowed for such certificate a fee of three shillings." (3)

Certificate of
acquittal or
conviction of
officers and
soldiers in
courts of ordinary criminal
jurisdiction.

1013. The articles of war provide that the court martial book, or the defaulter books, or certified copies, shall be *sufficient* evidence of previous convictions by courts martial; (4) and that on trials for drunkenness [§ 632] entries in the regimental, company, battery, or other defaulter books may be received as evidence. (5) There is no doubt but that in any case where a soldier pleaded [§ 560-1] that he had been "punished, ordered to suffer punishment, imprisonment or forfeiture" similar evidence would be admissible.

Convictions by
courts martial.

Evidence of
instances of
drunkenness,

and of summary
awards by
commanding
officers.

1014. The mutiny act of 1863 provided that the description return of a person committed to confinement as a deserter, in order to be proceeded against according to law, should "*in the absence of proof to the contrary*, be deemed sufficient evidence of the facts and matters therein stated." (6)

Description
return of person
committed on
a charge of
desertion
admissible in
evidence.

(3) M.A.39. A.W.156,

(4) A.W.155. See § 626-9.

(5) A.W.78.

(6) M.A.34. The form annexed to the act appears to have been overlooked in the many revisions to which the

Declaration
by recruit.

The mutiny act of the same year also, for the first time, provided that in the case of a recruit making a wilful false statement, [§32, 261] the declaration made on his attestation or enlistment should, in the absence of proof to the contrary, be sufficient evidence of his having represented the several particulars stated in the declaration. (7)

Record of
declaration of
court of enquiry
evidence
against deserter.

1015. The hundred and sixty-seventh article of war provides that the record of the absence of a soldier and of the declaration of the court of enquiry [§347*n*] thereon, as entered in the regimental court martial book, [§ 347*n*] or a copy, duly certified, shall, on a trial of such soldier be evidence of the facts therein recorded. [§182]

Record of
confession of
desertion.

1016. By the forty-sixth article, the record signed by the commanding officer, to whom a soldier makes a confession of desertion, or a copy, certified as therein directed, is sufficient evidence of the making of such confession. An addition to this article in 1863 for the first time legalized a peculiar description of proof, by providing that "a letter purporting to be written in reply to an inquiry respecting the truth or falsehood of such confession, and to be signed by or on behalf of the commanding officer of the regiment or corps from which such soldier confesses himself to have deserted, shall be admissible in evidence against such soldier, and shall be deemed to be legal evidence of the facts stated therein."

The confession
may be proved
to be false by an
official letter.

Quarterly
pay list.

1017. The mutiny act (*sec.* 59) provides that the last quarterly pay list, if produced, shall be evidence of a soldier's having been borne on the strength of any corps.

Proceedings
of courts
martial how
proved.

1018. The proceedings of general and district courts martial are put in evidence either by the production of the

mutiny act has been subjected during the last sixty years. In some places the prisoner is spoken of as "deserter," although as yet untried and unconvicted, instead of being always described as "prisoner," as he is in other places; but what appears most objectionable is, that "the prisoner" not only is "duly examined as to the circumstances," but is required to state whether he "is or is not a deserter,"—a question which many a man, within the writer's knowledge, has answered in the affirmative, when it had never occurred to him to desert his colours, and he had intended to admit no more than that he was absent without leave, or,

perhaps, only that he was the person described, and that he belonged to the regiment mentioned in the return. [§ 993] When the causes of the increase of desertion come to be enumerated, the too prevalent neglect of drawing this distinction [§ 182*n*] will most certainly have to be taken into account.

(7) M.A.48. When evidence is required from a soldier's attestation paper, the original is produced, but not attached to the proceedings. "A certified extract therefrom should be prepared and handed in for the purpose of being so attached."—G.O. 24, 1st March, 1875.

original minutes, or by a copy certified by the judge advocate general or his deputy. The proceedings of a regimental court martial are proved in like manner by the signature of the commanding officer, or the adjutant, having the custody of the original. On the trial of Lt. Colonel Crawley, the proceedings of the court martial at Mhow were proved by the production of a copy that was printed by order of the House of Commons, which was received by the court and the prisoner instead of a certified copy, the chief clerk in the judge advocate general's office having produced the original proceedings.(8) The proceedings of a court martial thus authenticated may be given in evidence against a prisoner tried for prevarication, or perjury, (9) or, as in Colonel Crawley's case, for words in an address to the court as prosecutor. It is hardly necessary to observe that the proceedings in such case are evidence against the prisoner, only to prove that the evidence was given or the statement was made, which is the subject of investigation, and not to prove falsehood or other allegation by the recorded testimony of witnesses who were examined on the trial.

Proceedings evidence of the deposition of a witness on his trial for prevarication, &c., or for improper statements in an address to the court.

1019. Mention has already been made [§ 528] of circumstances in which, on the formation of a fresh court, the evidence of a witness, before a court which has been dissolved, may be read over to him and entered on the proceedings.

Evidence on a former trial read over to, and acknowledged on oath by a witness, may be entered on proceedings.

1020. Depositions, as a general rule, are not admissible evidence.(1) In civil courts there are, however, exceptions in certain circumstances, which are little likely to arise on trials by courts martial; indeed never, except on trials for criminal offences in default of a civil court. Depositions relative to indictable offences, taken on oath, in presence of the prisoner, who must have had an opportunity of cross-

Depositions or interrogatories.

(8) Printed Trial, 1-4.

(9) For proof of perjury [§ 868] it has been ruled that the proceedings alone are not sufficient:—"Either the officer who recorded the statement forming the subject of the charge of perjury, or some person who was present, either as a member of the court or otherwise, should give evidence that the statement in question was correctly recorded."—J.A.G. 15th Jan. 1874.

(1) The Duke of Wellington, when in the Peninsula, urged upon the government at home "the expediency of enabling courts martial to receive written testimony when on foreign service." (15th March, 1813, *Despatches*, x. p. 192; also pp. 107, 200). Except in some special cases (specified § 1115-7) which hardly affect the general principle, the law has remained unaltered from that time to the present.

examining the witness, and in conformity with certain statutes, are admitted in evidence, if, upon being produced in court, they appear to have been duly taken, it being also proved to the satisfaction of the court, at the time of the trial, that the persons who made them are dead, incapacitated by illness from travelling, or kept out of the way.

Proceedings
of court of
enquiry when
evidence.

1021. Where a statement made before a court of enquiry is put in issue before a court martial, as, for example, where a discrepancy is alleged between the statement made there and the evidence given before a court martial; or where the alleged wilful falsehood of such statement becomes the occasion of a trial before a court martial, upon due permission, [§ 1007] the proceedings, if purporting to give the verbatim statement of the witness, may be given in evidence as confirmatory of such statement having been made. It ought to be superfluous to observe that the proceedings of a court of enquiry cannot be admitted as evidence of *the facts* detailed in the statement recorded by it, with the one exception already mentioned; [§ 1015] yet as a court martial has fallen into this error, it may be advisable to notice, that such irregularity has been condemned in general orders in the following terms, from which it may be inferred that, had not the conclusion of the court been justified by unobjectionable evidence, it could not have been supported by deductions from the proceedings of the court of enquiry: "Although the conduct of the court was irregular, in admitting the proceedings of a court of enquiry as evidence on this trial, yet as they appear to have been justified by unobjectionable evidence, in their ultimate conclusion, the Prince Regent was therefore pleased, in the name and on the behalf of His Majesty, to approve and confirm their finding and sentence." (2)

Acts of
parliament,
general and
public acts.

1022. Acts of parliament which relate to the kingdom at large, (when they are called *general* or *public*) are not, correctly speaking, the subject of proof in any court of justice, for, being the law of the land, they are supposed to be known to every man; and, therefore, printed copies of such acts and the printed statute books are resorted to by courts of justice,

not as evidence to prove that of which every man is supposed to be cognizant, but for the purpose of refreshing the memories of those who are to decide on them. Upon the same principle, the Queen's Regulations and orders for the army, and royal warrants and regulations emanating from the war office, are admitted on courts martial to refresh the memory, and do not require proof; it being a presumption of military law, that such orders are known to all military men, as public acts of parliaments are presumed to be known to the community at large.

General regulations and orders, war office regulations.

1023. The articles of war are, by the annual mutiny act, required to be judicially taken notice of by all courts whatsoever, and copies of the same, printed by the Queen's printer, are required to be transmitted by the secretary of state for the war department to the judges of the supreme courts at home, and to the governors of Her Majesty's dominions abroad. (3)

Articles of war;

1024. The Gazette, purporting to be printed by the Queen's printer, is good evidence of all acts relating to the Queen or state contained therein; [§ 1030] and, by the general orders of the army, is to be received as a due notification of all promotions, exchanges, or retirements. (4)

Gazette.

1025. By the 8 & 9 Vict. c. 113, all copies of private and local and personal acts of parliament, not public acts, of journals of parliament, and of royal proclamations, if purporting to be printed by the Queen's printers, shall be admitted as evidence thereof, without any proof that such copies were so printed.

Acts of parliament, not public and acts of state.

1026. Registers or public books, kept under the authority of particular statutes, or in public offices in the course of official duty, are admitted as evidence of such facts, required to be entered therein, as are peculiarly within the knowledge of the registering officer,—as, for instance, the register of the navy office, with proof of the usage to return all deaths happening at sea, is evidence of the death of a sailor; the prison books of prisons are admissible to prove the dates of the commitment and discharge of prisoners, but not to prove the cause of commitment; (5) and so, before the House of Lords, in March, 1852, when an officer in the army was a

Registers.

(3) M.A.1.

(4) Q.R.S.4,p.7.

(5) 2 Phillips, 14-8. Taylor, 1511.

Returns, &c.

petitioner for a divorce, a clerk from the war office was allowed to give evidence of his absence in Canada, as proved by the monthly returns. The record of service is evidence to prove such service, and muster rolls are *primâ facie* evidence of facts entered therein.

Recent statutory provision as to proof of documentary evidence.

1027. The production in evidence of many of the documents, above referred to, has been very much facilitated by recent statutes, and more especially by the provisions of the law of evidence amendment (14 & 15 Vict. c. 90) act:—

Examined copies of documents admissible in evidence ;

1028. (*Sec. 14*) "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted."

as are copies certified to be true.

Foreign and colonial acts of state, judgments, &c., provable by certified copies.

1029. The same act also provides (*sec. 7*) that "All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleading, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated" as therein mentioned.

Mode of proving certain documents.

1030. The "Documents Evidence Act, 1868" (31 & 32 Vict. c. 37), has further facilitated the proving of documents, by providing (*sec. 2*) "*Primâ facie* evidence of any proclamation, order, or regulation issued by Her Majesty, or by the privy council; also of any proclamation, order, or regulation issued by or under the authority of any such department of the government or officer as is mentioned therein, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes therein mentioned:—(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation. (2.) By the production

of a copy of such proclamation, order, or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession. (3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the privy council, of a certified copy or extract. Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing. No proof is required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order, or regulation."

1031. Persons forging or tendering forged copies or certificates of records or instruments made evidence by any act of parliament are guilty of felony, and may be sentenced to penal servitude for seven years, or not less than three (*now five*), or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement. (6)

Forging,
or tendering
in evidence
forged
documents,
a felony.

1032. The other class of writings to be spoken of are private writings. It is a general rule of evidence that where written evidence is in its nature superior to parole or oral evidence, the writing ought to be produced, and unless its non-production is accounted for, parole evidence of its having been written and its contents is inadmissible. The law requires the best evidence to be produced of which the nature of the case is capable.

PRIVATE
WRITINGS :
general rule
as to production
of written
evidence.

1033. So also the contents of any writing must be proved by the production of the letter, or other document, itself, unless the court is satisfied that this is impossible. Otherwise the court might be put in possession of a part only and not the whole of a written paper ; and it might happen that the whole, if produced, might have had an effect very different from that produced by a detached part. Where, however, documents are of great length and contain irrelevant matter, and parts only are intended to be relied on, extracts only may be put in evidence, [§ 1046] with such further passages as may be suggested by the opposite party, or required by the court.

Originals to
be produced.

Passages
not to be
extracted,
except by
consent.

1034. The obvious impropriety of destroying the originals

Impropriety of
destroying
papers required
to be produced.

of letters or papers, after having been required to produce them in evidence, was severely animadverted upon in the general order, promulgating the general court martial on Lieutenant Hyder, of the 10th Royal Hussars :—

Displeasure
of Her Majesty
at such conduct
was signified
in a general
order.

“ Her Majesty was pleased to observe, that it appeared that after the assembly, and during a short adjournment of the court, a civilian, the principal witness for the prosecution, did, in the presence, and with the acquiescence of Colonel Vandeleur, the prosecutor, destroy certain documents, which at the instance of the prisoner, such witness had been duly required to bring with him for production before the court—one of such documents being a letter having reference to the subject matter of the charge against Lieutenant Hyder, addressed on the 9th of May, 1845, by Colonel Vandeleur, to the said witness; and Her Majesty was pleased to express her displeasure that Colonel Vandeleur, hastily acting, as he declares, under an impression that these documents were not in a state fit to be produced in court, and that the fair copies in his possession would be much better, should have acquiesced in a proceeding, the impropriety of which must, on reflection, be obvious to him, notwithstanding that Lieutenant Hyder, having been acquitted, has not suffered prejudice; and notwithstanding that Colonel Vandeleur had in court, and was ready to produce a paper which he alleged to be a true copy of such letter; and as to the authenticity and truth of which copy Colonel Vandeleur, who wrote the letter, the clerk who copied it, and the witness who received it, might have been examined, if Lieutenant Hyder had thought fit so to do.” (7)

Writings
withheld after
notice, contents
may be proved.

Proof of notice
to produce
writings.

1035. If papers are in the possession of the opposite party, due notice for their production should be given; after which, if not produced, secondary evidence may be given of their contents. The prosecutor more usually gives notice to the prisoner through the judge advocate, or he may prove a parole notice to produce writings, by a third person who delivered the notice, or by one who heard it delivered. The prisoner procures a summons for the prosecutor, with the *duces tecum* clause [§ 890] in the usual manner from the judge advocate or president. A written notice to produce may be proved by a duplicate original.

1036. When in compliance with a notice either party produces a written instrument in evidence, he is entitled to have the whole read; and if the writing produced refers to other writings, with such particularity as to make it necessary to inspect them that the sense may be complete, or, referring to other writings, adopt them as part of its own meaning, he may insist on having them also read in evidence.

Party producing writings may have the whole read, and any writings referred to, if necessary to complete or explain the sense.

1037. The judge advocate reads in open court [§ 573] such documentary evidence as may have been duly proved and admitted by the court. The witness who produces it cannot be required to do so, and the party calling for its production cannot do so without permission.

By whom read.

1038. Parole evidence may be given of the contents of a writing proved to be lost or destroyed, or traced to the possession of the adverse party, who refuses to produce or account for it; or a counterpart, or duplicate, or an attested copy, will in such circumstances be received. (8) It is the practice of courts martial, as referred to in the above remarks [§ 1034] on Lieutenant Hyder's case, where the impracticability of producing the original documents, or other sufficient reason is adduced (of which the court will judge), to admit copies, which must be attested in court by the person who actually made the copy, or who may subsequently have examined and compared it with the original.

Writings lost, destroyed, or withheld, attested copy admitted.

Practice of courts martial sanctioned by Her Majesty's remarks.

1039. The entry of a letter by a deceased clerk, who kept the book, according to the course of business, with great punctuality, was admitted by Lord Ellenborough, as *prima facie* evidence (which the defendant might rebut by producing the original) of the contents of a letter traced into his possession, and which, on notice, he did not produce. (9) Upon the same principle courts martial receive order-books and letter-books of corps or departments, to prove a written order, or in proof of an official letter, of which the copy is therein entered, when the original has been lost, or the prisoner does not produce it. When the production of the book itself is attended with inconvenience, a copy may be received when the person who produces it swears it is a true copy, either from having made it, or from having compared

Letter-book received in evidence.

Order-books

(8) 1 Phillips, 452. 2 Phillips, 272-5.

(9) 2 Phillips, 294.

or sworn
copies.

it with the original. Courts martial have not unfrequently admitted copies verified by the signature of the officer in custody of the order or letter-book; but, convenient as this may be, it may admit of question how far there is any legal authority for their so doing, inasmuch as the law having provided for the admission of certified copies in certain specified cases [§ 1015, 1016, &c.] may be taken to exclude them, when it has made no such provision.

Query, as
to certified
copies.

Post-marks
evidence as to
letters having
been in post-
office.

1040. Post-marks, proved to be such, are *primâ facie* evidence that the letters on which they are, were in the office to which these marks belong, at the date of the marks, but they are not conclusive evidence to that effect. (1)

Identification
of handwriting.

1041. To identify handwriting, the oath of the writer, or his admission, if produced against him, is the best evidence; then the testimony of persons who saw the writing actually written; or of persons who, from a knowledge of the writer, and from having seen him write, are acquainted with his handwriting. A person is competent to attest handwriting, who has seen the writer write, if only once. And a witness, though he may not have seen the person write, whose handwriting is to be proved, may be admitted to speak of it if he has been in correspondence with him, and if he has seen letters which are proved to have been written by him. (2)

Comparison of
disputed writing
is now
permitted.

1042. Until the year 1865 it was contrary to the common law to compare two writings, the one with the other, in any criminal court in order to ascertain whether both were written by the same person. In that year, however, it was provided by "Denman's Act" (28 Vict. c. 18, s. 8) already mentioned [§ 977] that in any court, including courts martial, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Under this law, any writings which have been proved to the satisfaction of the court may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose. This comparison may be made by witnesses

(1) 2 Phillips, 310. Taylor, 1581-4. (2) 2 Phillips, 154. Taylor, 181.

acquainted with the handwriting, or by skilled witnesses or *experts*, or by the court without the intervention of any witnesses. (3) A witness may be required to read writing or to write in the presence of the court. (4)

1043. Letters or private writings, (unlike records and public documents, technically so called) are in no case evidence of the facts stated in them ; but they are not only the best proof of their having been written, but also the best proof where facts result from, or depend on, their contents. They are admitted in evidence as before observed, when in the nature of acts, [§861] or as proof of intention, or when they are part of the subject matter of a charge, as for writing a disrespectful letter, for disobeying a written order, and so forth.

How far letters are evidence of facts related in them.

Contents may be evidence or subject of charge.

1044. Whilst on this subject, a few words may be added as to the interpretation of written laws and other writings. Sir William Blackstone says : the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of them all. It will not be necessary to follow the learned commentator at length. He observes, that *words* are generally to be understood in their usual and most known signification ; not so much regarding the propriety of grammar, as their general and popular use. That terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. When words are dubious, we may establish their meaning from the *context* ; with which it may be of singular

Interpretation of writings.

In fixing the intention of a law, words to be taken according to common acceptation.

Words,

and technical terms, in their peculiar sense ;

(3) Taylor, 1587. Mr. Taylor also observes that an opinion may be formed as to the resemblance or difference of the writings produced, with respect to the general form and character of the handwriting, the forms of the letters, and the relative number of diversified forms of each letter, the use of capitals, abbreviations, stops, and paragraphs, the mode of making erasures, or of inserting interlineations or corrections, the adoption of peculiar expressions, the spelling of words, the grammatical construction of the sentences, and also on the fact of one or

more of the documents being written in a feigned hand,—Taylor, 1588. He refers to "The Handwriting of Junius, professionally investigated by Mr. Charles Chabot, Expert," to which may be added, as being, perhaps, more within reach, a review of the work in the *Quarterly Review*, April 1871. No. CCLX. 328.

(4) See cross-examination of Stephen Grant, a negro constable, on the trial of Assist. Surgeon Cullen. The words written by him were annexed to the proceedings. *Printed Trial*, Q. 290 Appendix D, p. 261.

the words to be judged by the context, and by comparison with other laws,

according to *subject matter*,

by their effect,

and the occasion of an enactment.

Meaning of writings.

Except in special cases

copies of original documents are entered on or annexed to proceedings,

the testimony by which they are substantiated being recorded.

use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the preamble is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. And as to the *subject matter*, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. And lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it, or the cause which moved the legislator to enact it. (5)

1045. Nor is this principle of interpretation confined to laws:—it ought to be borne in mind that the intention of all writings must be judged from all their parts, taken together, and not from any isolated or detached passage; that faults in orthography or in the grammatical construction of sentences, if the intention is apparent, cannot vitiate their design. It may also be remarked that, though collateral circumstances may be considered when endeavouring to fix the meaning of ambiguous passages, yet in such case the circumstances must be referred to in the writing itself.

1046. Except where the court considers that an actual inspection of the original is necessary to enable the revising officer to form his judgment, it is not necessary to annex original documents, admitted in proof, to the proceedings of courts martial. Copies of them, or, if voluminous, extracts so far as they bear on the question, and to the extent required by the parties, or directed by the court, should be embodied in the proceedings, in the order in which they may be produced in evidence. If the handwriting of any original documents, or the truth of any copy, be *admitted* by the party against whom they may be produced, such admission must be recorded, instead of the testimony, by which they

would otherwise be supported. Instead of delaying the trial to take down, and enter on the proceedings, documentary evidence as it is read, it is usual, unless the document or extract does not exceed a few lines, to annex or append copies to the proceedings; in which last case, they must be numbered or lettered, (6) and referred to in their proper order on the face of the proceedings. If not in the handwriting of the judge advocate, or copies, certified according to law, they must be compared by him, and in every case they must be identified by his signature, or by that of the president, as must also all original documents, which are annexed to the proceedings.

1047-9. With respect to the admission, and the annexing to the proceedings, of writings which are not legal evidence, it may be observed that it is customary to allow a prisoner to introduce in his defence, or lay before the court testimonials or letters relative to character, which are then attached to the proceedings, (7) so that the authority which has to confirm the sentence may thereby have an opportunity of attributing to them their due importance and influence. But it must be borne in mind, that evidence as to character, to weigh in the finding of the court, must not only apply to the charge, but be strictly *legal* evidence. If a court be not authorized to admit a deposition, when made before a person empowered to administer oaths, much less can it admit any statement in writing, when not substantiated by the sanction of an oath. It is scarcely necessary to remark, that courts martial cannot allow the genuineness of letters or other similar documents as to character, to be attested on oath before them, as to allow this with respect to that which is not evidence, would be to misapply and trifle with an oath.

Annexing to proceedings, writings not evidence.

The handwriting of documents, not evidence, cannot be verified on oath.

(6) It is convenient to note on the document a cross-reference to the part of the proceedings where it was given in evidence, and if more than one leaf, or sheet, to specify the number thus—
“A. Q.— A.B. President;” or
“B. (—sheets.) Q.— A.B. President.”

retain the originals, he merely lays the letters or certificates before the court for their inspection, and embodies copies in his address, where it is written; or, what is more usual in every case, requests the president or the judge advocate to substitute copies verified by their signature.

(7) When the prisoner wishes to

CHAPTER XXV.

OF THE TRIAL OF CIVIL OFFENCES.

Courts martial
to dispense
criminal law,

1050. TREASON and other civil offences, which, if committed by officers or soldiers "in England, would be punishable by a court of ordinary criminal jurisdiction, and not by a court martial," (1) are tried by a general court martial, if committed by them, when serving at Gibraltar; (2) or in India, at a distance of 120 miles from either of the three presidencies, (excepting Prince of Wales' Island, Singapore, or Malacca); (3) or in any other of the Queen's dominions beyond seas, where there is no competent court of civil judicature; (4) or out of the Queen's dominions. (5)

convened as
dependent on
place;

1051. Such general courts martial are convened at Gibraltar, and in other places within the Queen's dominions (including India) "by the officer commanding in chief;" (6) and out of the Queen's dominions, "by the general or other officer having power to appoint courts martial." (7)

and required to
conform to the
law of England;

1052. The award of punishment in India is regulated by the local code. (8) The articles conferring the jurisdiction, in other cases, prescribe that the offender, if found guilty,

(1) This definition of the civil offences, subjected to the cognizance of general courts martial, was adopted in the articles of 1856. The articles of former years had not, in express terms, included misdemeanors, not being offences against person or property, nor other offences not amounting to felony, which nevertheless, in certain circumstances, of necessity, became cognizable by courts martial.

(2) A.W.143.

(3) M.A.101. The 134th article merely refers to the mutiny act.

(4) A.W.143. Officers and soldiers were not in any case subjected to trial by foreign law until the year 1832. See § 75-9, 166. As to the application of English law to non-military persons under a proclamation of martial law in ceded colonies, where the civil courts

retain the foreign law of the former possessor, see § 100-105.

(5) M.A.101. A.W.145.

(6) A.W.143. See § 1260, 1265.

(7) A.W.145.

(8) M.A.101. The Indian penal code was originally drafted by Lord Macaulay, and, after more than a quarter of a century's preparation, came into force in 1860, and has since then had its omissions supplied and been otherwise amended by the legislative council. It does not retain the technical distinctions of English law as to felony and misdemeanor, and also differs from it in other respects. These variations will not be again adverted to in this notice of the criminal law, as officers whose duty it is to apply it in India have every facility for obtaining the requisite information.

shall be liable, in the case of an offence which, if committed in England, would be capital, (9) to suffer death or such other punishment as by the sentence of such general court martial shall be awarded; and in the case of any other offence to suffer such punishment other than death as by the sentence of such general court martial shall be awarded; "no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of English law in regard to the punishment of offenders." In all cases, where a court martial has convicted any officer or soldier of any offence punishable with death, the articles expressly provide that, instead of sentencing the offender to death, it may adjudge him to be kept in penal servitude for a term of not less than five years. (10)

but with a power to commute death to penal servitude.

1053. The reference to *English law* in the proviso above quoted, which was inserted in the articles of 1856, will be best understood by a comparison with the articles of previous years. The corresponding provision was worded: "Such sentence nevertheless to be in conformity with the common and statute law of England." This was introduced into the articles of war only in the year 1830; but His Majesty King George the Third had previously declared the true meaning and intent of the parallel article (1) to be, that courts martial, exercising jurisdiction under it, *were bound to award such punishments only as are known to the laws of England, and that they were bound also to apply to each particular offence the same punishment, both in kind and degree, that is applied by the common or statute law of England.* (2)

Legal bearing of the provision as to English law.

1054. To whatever extent the terms of the existing provision, as to the punishment of civil offences may have been intended to modify the previous practice of courts martial, it is equally certain that every British officer, to be prepared to meet the duty which frequently awaits him on foreign service, ought to have such a general knowledge of the criminal law of England as may enable him to make the

Officers required to have some knowledge of criminal law.

(9) The only crimes which, by the operation of the Criminal Statutes Consolidation Acts, continue to be punishable with death, are treason, murder, and piracy accompanied with wounding or attempt to murder.

(10) A.W.143, 146.

(1) This article of war (sec. xxiv. art. 4) had been held not to require adherence to the law of England.—*See the case of Gunner Suddis, § 75(8).*

(2) Circular, Horse Guards, 12th December, 1807.

Expediency of
adverting to the
criminal law.

distinction between crimes, which the law has established in respect to the punishment of offenders, and, by being in some measure familiarized with the subject, to have little difficulty in seeking for authorities to guide him in particular cases, or of profitably using those which a judge advocate may bring to his notice. For these reasons, it has appeared advisable briefly to refer to the criminal law, and particularly to the offences which were specified in the articles of war, before the substitution of more general terms. (3) Some offences against the Royal prerogative (as they are commonly termed) are also noticed, as on the proclamation of martial law, the spirit, if not the letter, of the law of England would still pervade the judgment of courts martial. (4)

Liability of per-
sons to punish-
ment,

unless excepted
in respect to
incapacity, or
compulsion.

Principals and
accessories.

PRINCIPAL,
in the first
degree :

in the second
degree.

Constructive
presence of
principal in
second degree,

1055. It has been shown, [§ 589-97] when speaking of the prisoner's defence, who are capable of committing crime ; or rather, upon what grounds persons are exempt from the punishment ordinarily attending the commission of certain acts. No notice has, however, been taken of the distinction between principals and accessories, as an accessory or abettor to a military crime may always be charged with a substantive offence.

1056. As regards civil offences, persons, in certain cases, may be capable of offending either as principals or accessories.

1057. The law further distinguishes between a principal in the first degree, who is the actor, or absolute perpetrator of the crime, and a principal in the second degree, who is present aiding and abetting the fact to be done. This presence need not always be an actual immediate standing by, within sight and hearing of the fact, but there may be also a constructive presence, as when one commits a robbery or murder and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions ; for, in case of murder by poisoning, a man may be a principal

(3) The hundred and second article of war of 1840, and previous years, was worded, "any officer or soldier, accused of treason, murder, theft, robbery, rape, coining or clipping the coin of the realm, or any foreign coin current in the place where such officer or soldier shall be serving ; or of any

other capital or other felony punishable by the known laws of the land."

(4) The author's own opinion was that courts martial ought to be guided by the law of England to the exclusion of the law of the place.—See before, § 100-6. See also, as to "Followers of the army," § 71, 99.

felon, by preparing and laying the poison, or persuading another to drink it, who is ignorant of its poisonous qualities, or giving it to him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold with regard to other murders, committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect; as by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast with intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues. In all these cases, the party offending is guilty of murder, as a principal in the first degree. (5)

of principal in first degree.

1058. An accessory is he who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein, either *before* or *after* the fact committed. (6) In high treason there are no accessories, but all are principals; the same acts that make a man accessory in felony making him a principal in high treason. In murder and other felonies there may be accessories, except only in those offences which, by judgment of law, are sudden and unpremeditated, as manslaughter and the like, which cannot therefore, have any accessories *before* the fact. (7) So too in misdemeanors and in all crimes under the degree of felony, there are no accessories, either before or after the fact; but all persons concerned therein, if guilty at all, are punishable as principal offenders. (8)

Accessory,

in felonies, only

Abettors in misdemeanors.

1059. An accessory before the fact, is defined to be one who, being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony. Herein, absence is necessary to make him an accessory; for if such procurer be present, he is guilty of the crime as a principal. It is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he, who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act, but is not accessory to any act distinct from the other. (9)

Accessories before the fact,

(5) 4 Blackstone, Com. 34-35.
6 Id. 35.
d. 36.

(8) Id. 36. 24 & 25 Vict. c. 94,
s. 15.
(9) 3 Black. Com. 37.

Accessory after
the fact.

1060. An accessory after the fact, is where a person knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory after the fact, it is, in the first place, requisite that he knew of the felony committed, (and that it was committed by the party in question). (1) In the next place, he must receive, relieve, comfort, or assist him. And generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory; as, furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony, (2) (but not so, of merely suffering a felon to escape). (3) To relieve a felon in (or bailed out of) prison, with clothes or other necessaries, is no offence, (nor is it in the physician or surgeon who attends a felon sick or wounded, although he knew him to be a felon) (4), the crime imputable to this species of accessory being the hindrance of public justice, by *assisting* the felon to escape the vengeance of the law. (5) The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. But, so strict is the law, where a felony is actually complete, the nearest relations are not suffered to aid or receive one another. Even if the parent assists his child, or the child the parent; if the brother receives the brother, the master his servant, or the servant his master, or, even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories after the fact. (5) But a married woman cannot become an accessory for the receipt and concealment of her husband; for she is presumed to act under his coercion, and, therefore, she is not bound, neither ought she, to discover her lord. (6)

Nearest relations
cannot aid a
felon;

except that a
wife may conceal
her husband.

Statutory provi-
sions for trial of
receivers.

1061. Although receivers of stolen goods, not being within the above definition, were not, at common law, accessories to

- (1) 2 Hawk. c. 29, s. 32.
- (2) 4 Black. Com. 38-9.
- (3) 1 Hale, 619.

- (4) 1 Hale, 332.
- (5) 4 Black. Com. 38.
- (6) Id. 39.

the theft, (7) nor, generally, triable until the person guilty of the principal offence had been convicted; the statute law, [§ 1201-3] has made them accessories after the fact, where the original offence was a felony, and, whether the original offence was a felony or misdemeanor, in all circumstances liable to be tried for a substantive offence, equally with accessories.

analogous to those for accessories.

1062. Legal subtleties formerly interfered to prevent the trial of accessories in a great number of cases, but now the act to consolidate and amend the statute law relating to accessories to, and abettors of, indictable offences, (24 & 25 Vict. c. 94) enacts "as to accessories before the fact (*sec. 1*): Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." (8) (*Sec. 2.*) "Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

ACCESSORIES before the fact

may be tried and punished as principals;

and indicted as such, or as substantive felons.

1063. "As to accessories after the fact (*sec. 3*): Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of

Accessories after the fact may be indicted as such, or for a substantive felony.

(7) Because, it was said, they received the *goods* only, and not the *felon*.—4 Bl. Com. 38.

(8) This clause is taken from the 11 & 12 Vict. c. 36, s. 1, upon which it was held that it was no objection

to an accessory before the fact being convicted, that his principal had been acquitted, the statute having made the offence of an accessory before the fact a substantive felony.

24 & 25 Vict.
c. 94.

Punishment of
accessories after
the fact.

a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished." (*Sec. 4.*) "Every accessory after the fact to any felony (except where it is otherwise specially enacted), (9) whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour." (1)

Separate acces-
sories may be
tried together,
although prin-
cipal felon not
included.

1064. As to accessories generally, (*sec. 6*): "Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

Abettors in
misdemeanors.

1065. As to abettors in misdemeanors, (*sec. 8*): "Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

Offences herein
treated of.

1066. The more important offences will now be referred to: in the first place, treason, [§ 1067] and felony in general; [§ 1073] then offences of a public nature or injurious to the Queen's prerogative; [§ 1075] to which is added a brief notice [§ 1105] of offences against the quarantine laws; and afterwards other offences against person [§ 1106] and property. [§ 1157]

Treason,

1067. TREASON is defined to be an offence against the security of the Queen and her dominions. From the nature and definition of this crime, opportunity was afforded to create many constructive treasons, that is, to raise, by forced and arbitrary constructions, to the crime and punishment of treason, offences which never were suspected to be such, until the statute of the 25th Edward III. (st. 5, c. 2) declared the

(9) As to accessories after the fact in murder, see § 1122(8).

(1) As to punishment of receivers of stolen goods, see § 222, 1201-3.

offences which, for the future, should be held to be treason:—First.—*When a man doth compass or imagine the death of our lord the King, or our lady his Queen, or their eldest son and heir.*

compassing the death of the King, Queen, or eldest son and heir.

1068. Secondly.—*If a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir.*

Violating the Queen consort.

1069. Thirdly.—*If a man do levy war against our lord the King in his realm.* Though a conspiracy to levy war will be evidence of an overt act for compassing the King's death, yet if the charge be for levying war only, it must be proved that war was actually levied, to bring the prisoner under this clause of the statute. (1) If war be levied, all the conspirators, though not in arms, are traitors. Where great numbers, by force, endeavour to remove certain persons from the King; or to deliver men out of prison, or, by intimidation and violence, to force the repeal of a law, or to reform religion; these acts will be high treason: so also, to pull down *all* brothels, *all* enclosures, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the King's authority. But where a number of persons rise to remove a grievance to their private interests, as to pull down a particular house, to lay open a particular enclosure, they are only considered as rioters. (2) Some offences, amounting to treason, are in the present day preferably dealt with under the treason-felony act, the maximum punishment under which is penal servitude for life. (3)

Levying war against the King in his realm.

1070. Fourthly.—*If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere.* This must likewise be proved by some overt act, as by giving them intelligence or advice; by sending them money or provisions, although intercepted; by selling them arms; by treacherously surrendering a fortress, and the like. By *enemies*, as here expressed, must be understood either the subjects of foreign powers with whom we are at open war; pirates, who may invade our coast, without any open hostilities between their nation and our own, and without any commission from any power or

Being adherent to or succouring the King's enemies.

(1) 1 Hawkins, 55.

(2) 4 Blackstone, Com. 81.

(3) See § 1076.

state at enmity with the crown of Great Britain; and our own fellow-subjects, when in actual rebellion. (4)

Punishment for
high treason.

1071. By the 54 Geo. 3, c. 146, s. 1, the punishment of a man convicted of high treason was to be drawn on a hurdle to the place of execution, and be there hanged by the neck until dead, and that afterwards the head shall be severed from the body, and the body divided into four quarters and disposed of as His Majesty or his successors shall think fit; and (*sec. 2*) the Queen may, by warrant under the sign manual, direct that the offender be taken, instead of drawn, to the place of execution, and may substitute beheading whilst alive, instead of hanging. The 33 & 34 Vict. c. 23, s. 32 repeals so much of former acts as required the judgment against persons adjudged guilty of high treason to include the drawing on a hurdle to the place of execution, and, after execution, the severing of the head from the body, and the dividing of the body into four quarters.

Drawing and
quartering
abolished in 1870.

Misprision of
treason;

1072. MISPRISION OF TREASON consists in the bare knowledge and concealment of treason, without any degree of consent thereto; for any assent makes the party a principal traitor. This concealment becomes criminal, if the party apprised of the treason do not, as soon as conveniently may be, reveal it to some judge of assize, or justice of the peace. But if there be any probable circumstances of assent, as if one go to a meeting, knowing beforehand that a treasonable conspiracy is intended, or being in such company once by accident, and having heard such treasonable conspiracy, meet the same company again, and hear more of it, but conceal it; this is an implied assent in law, and makes the concealer guilty of high treason. (5) The punishment of misprision of treason is, loss of the profits of lands during life, forfeiture of goods, and imprisonment during life. (6)

punishment.

Definition of
felony.

1073. "FELONY" is defined by Sir William Blackstone as "an offence which occasions a total forfeiture (7) of either lands or goods, or both, at common law; and to which capital or other punishment may be superadded, according to the

(4) 4 Blackstone, Com. 83. Other offences declared by the statute of Edward III. (§ 1067) are no longer punishable capitally, and, by the course of recent legislation, have been reduced to felonies.

(5) 4 Blackstone, Com. 120.

(6) *Id.* 121.

(7) Forfeiture for treason, felony, and *felo de se*, was abolished in 1871, by the 33 & 34 Vict. c. 23.

degree of guilt." The term "misdemeanor," in its legal acceptation, is confined to such indictable offences as do not amount to treason or felony. (8)

Misdemeanor, as contradistinguished from felony.

1074. Soldiers who are convicted of felony in the United Kingdom, or elsewhere, of an offence amounting to felony, thereupon forfeit all advantage as to good conduct pay, and pension on discharge, which might otherwise have accrued from the length of their *former* service. (9)

Military forfeitures consequent on conviction of felony.

1075. The offences of a public nature, or injurious to the Queen's prerogative, which it may be advisable to notice, are:—*Felonious compassing to levy war*; [§1076] *Offences relating to the coin*; [§1077] *The offence of serving a foreign prince or state*; [§1086] *The embezzling the Queen's stores of war*; [§1087] *Desertion from the Queen's armies in time of war*; [§1088] *Seducing soldiers or sailors from their duty and allegiance*; [§1089] *Administering unlawful oaths*; [§1090] *Illegal training and drilling*; [§1092] *Unlawful assemblies*; [§1093] and *Breaking quarantine*. [§1105]

Offences injurious to the Queen's prerogative.

1076. *Felonious compassing to levy war*. The 11 & 12 Vict. c. 12, generally known as the *Treason-Felony* act, without in any way abrogating the ancient law upon treason, has provided a more lenient way of dealing with cases of constructive treason. [§1069] It enacts (*sec.* 3) that "If any person whatsoever after the passing of this act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or councils, or in order to put any force or constraint upon, or in order to intimidate or overawe both

Felonious compassing to levy war,

(8) Blackstone, Com. 95.

(9) A.W.168. The definition above given (§ 1073) is not calculated to be practically useful to officers in making up the record of service of soldiers who have been convicted of civil offences; but, as regretted by the

learned gentleman who prepared the bills for the consolidation of the criminal law, "nothing can be more unsatisfactory than the distinctions between felony and misdemeanor in the present day."—*Greaves' Criminal Law Acts*, 1861, p. xlv.

punishable by
penal servitude
or imprison-
ment ;

although the
facts may
amount to
treason.

24 & 25 Vict.
c. 99.
Coinage offences.

Counterfeiting
gold or silver.

Colouring silver
or copper coin ;

felony.

Punishment.

Impairing gold
or silver coin ;

houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, [or by open and advised speaking, (1)] or by any overt act or deed, (2) every person so offending shall be guilty of felony, and being convicted thereof shall be liable" (20 & 21 Vict. c. 3, s. 2 and 27 & 28 Vict. c. 47, s. 2) to penal servitude for life, or for not less than five years, or to imprisonment not exceeding two years, with or without hard labour. It also enacts (*sec. 7*) that if the facts or matters proved on the trial of any person amount to treason, such person shall not be entitled to be acquitted of such felony, and if tried for felony shall not be afterwards prosecuted for treason upon the same facts.

1077. As to *offences relating to the coin*, it will be enough to refer to the more common offences dealt with under the 24 & 25 Vict. c. 99, consolidating and amending the statute law against offences relating to the coin. By *sec. 2*, whosoever counterfeits the gold or silver coin ; (3) or, *sec. 3*, colours counterfeit coin or any pieces of metal with intent to make them pass for gold or silver coin ; or colours or alters genuine coin with intent to make it pass for a higher coin, shall be guilty of felony and liable to penal servitude for life or not less than [*five*] years, or to imprisonment for two years with or without hard labour and with or without solitary confinement.

1078. By *sec. 4*, persons impairing, diminishing or lightening the gold or silver coin with intent that it may pass cur-

(1) *Sec. 4*, limited prosecutions where the compassing is declared "by open and advised speaking only," to "within two years next after the passing of the act."

(2) *Sec. 5* provides that in any indictment for felony under this act, it shall be lawful to charge any number of the matters, acts, or deeds, by which such compassings, &c., shall have been expressed, uttered, or declared.

(3) Under the interpretation clauses of this act, the expression "the Queen's current gold or silver coin"

includes "any gold or silver coin coined in any of Her Majesty's mints, or lawfully current, *by virtue of any proclamation or otherwise*, in any part of Her Majesty's dominions, whether within the United Kingdom or otherwise." The expression "the Queen's copper coin" in like manner includes any copper coin and any coin of bronze or mixed metal. The words in *italic* were inserted on the passing of the present act in 1861, and include all foreign and other coins legally current in the colonies.

rent, are guilty of felony, and liable to penal servitude not exceeding fourteen or less than [*five*] years, and to imprisonment, as above, § 1077.

24 & 25 Vict.
c. 99.
felony.
Punishment.

1079. By *sec. 9*, "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit," shall be guilty of a misdemeanor, and liable to be imprisoned for one year, as above, § 1077.

Uttering counterfeit gold or silver coin,
.
misdemeanor.

1080. By *sec. 12*, persons convicted of a second offence of uttering, &c., after a previous conviction for the same, or after a conviction of felony relating to the coin, are guilty of felony and liable to penal servitude for life, or not less than three, now *five* years, or imprisonment for two years, as above, § 1077.

A second offence,
felony.

1081. By *sec. 13*, persons uttering foreign coins, or medals, as current coin, "being of less value than" such current coin, are guilty of misdemeanor, and liable to imprisonment not exceeding one year, as above, § 1077.

Uttering foreign coin with intent to defraud.

1082. By *sec. 14*, counterfeiting the copper coin is a felony punishable by not more than seven years' penal servitude or two years' imprisonment as above, § 1077.

Counterfeiting copper coin,
a felony.

1083. By *sec. 15*, uttering base copper coin is a misdemeanor punishable by not more than one year's imprisonment, as above, § 1077.

Uttering base copper coin,
a misdemeanor.

1084. By *sec. 16*, defacing the current coin, gold, silver, or copper, by stamping names or words thereon, is a misdemeanor, punishable by imprisonment not exceeding one year with or without hard labour, but the act is in this case silent as to solitary confinement.

Stamping names on coin,
a misdemeanor,
punishable by imprisonment,
not solitary.

1085. *Sec. 29* enacts that it is not necessary to produce a moneyer or other officer of the mint to prove a coin counterfeit, but that it may be proved by any other credible witness; and *sec. 1* declares that any current coin which shall be gilt, silvered, coloured, washed, or cased over, or in any manner altered so as to resemble a higher denomination, shall be deemed to be "counterfeit coin;" and farther, that having in possession shall extend to "knowing and wilfully" having it in the custody or possession of any other person, and to the having it in any place; whether for the benefit of the offender or that of any other person.

What shall be sufficient proof of the coin being counterfeit.

Rules of interpretation, as to

"counterfeit,"

"possession."

Serving a foreign state ;

disobeying the Queen's letter of recall.

Entering a foreign service without Her Majesty's leave ;
33 & 34 Vict.
c. 90 ;

or inducing others to do so ;

or leaving or inducing others to leave the Queen's dominions with the like intent.

Embezzling stores of war.

1086. *Serving a foreign prince or state.* Entering into the service of any foreign state without the Queen's consent, or contracting with it any engagement which subjects the party to an influence or control, inconsistent with the allegiance due to the sovereign, is at common law a high misdemeanor and punishable accordingly. (4) Disobedience to the Queen's letter to a subject, commanding him to return from beyond the seas ; or to the Queen's writ of *ne exeat regno*, commanding a subject to stay at home, is a high misprision and contempt. And it is considered so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so ; as to receive a pension from a foreign prince without the leave of the Queen. (5) And with respect to serving or procuring others to serve foreign states, the "Foreign Enlistment Act, 1870," repeals the 59 Geo. 3, c. 69, and (*sec. 4*) enacts that "If any person without license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts, or agrees to accept, any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept, or agree to accept" such commission or engagement—he shall be punishable by imprisonment with or without hard labour, or fine, or both punishments. The same penalty is enacted (*sec. 5*) for a British subject leaving the Queen's dominions with intent to serve a foreign state, as above ; or any person inducing another to do so.

1087. *Embezzling the Queen's stores of war.* Persons, subject to the mutiny act, can be punished for embezzlement by sentence of a court martial only under the powers of the mutiny act, [§ 205] though the trial be held abroad, where there may be no form of civil judicature in force. (6)

(4) Blackstone, Com. 122.

(5) 1 Hawkins, 91.—It is declared in the regulations respecting foreign orders, "No subject of Her Majesty shall accept a foreign order from the sovereign of any foreign country, or wear the insignia thereof, without having previously obtained Her Majesty's permission to that effect, signified by a warrant under her royal sign manual." Q.R. App. No. 2.

(6) Letter of the commander in chief, 12th December, 1807.

The "Naval Stores Act, 1867," and the "War Department Stores Act," repealing former acts, make provision as to marking of government stores, and the obliteration of marks, and receiving marked stores, incorporating in these acts the provisions of the act 24 & 25 Vict. c. 96, as to larceny, &c. [§ 1158]

1088. *Desertion from the Queen's armies in time of war.* Desertion,
The provisions of the mutiny act make it unnecessary to notice in this place *desertion* as a felony injurious to the prerogative. It may however be remarked, that soldiers deserting from the King's armies were punishable as felons by the 18 Henry 6, c. 19, and subsequent acts.

1089. *Seducing soldiers or sailors from their duty and allegiance.* Seduction of soldiers or sailors,
The 37 Geo. 3, c. 70, a similar act having been passed in the parliament of Ireland of the same date, both made perpetual by the 57 Geo. 3, c. 7, enacts, that any person who shall maliciously and advisedly endeavour to seduce any person serving in His Majesty's service, by sea or land, from his duty and allegiance; or to incite any person to commit any act of mutiny or mutinous practice, shall be guilty of felony, (7 Will. 4 & 1 Vict. c. 91, s. 1, and 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47, s. 2) liable to penal servitude for life or not less than [five] years, or imprisonment for not more than three years, with or without hard labour, and with or without solitary confinement. felony.

1090. *Administering unlawful oaths.* Administering unlawful oaths.
The 37 Geo. 3, c. 123 enacts, that whoever shall administer, or cause to be administered, or shall be present at, and consenting to the administering of, or shall take any oath or engagement intended to bind any person in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee or any person not having legal authority for that purpose, or not to give evidence against any confederate or other person, or not to discover any unlawful combinations, or any illegal act, or any illegal oath or engagement, shall be guilty of felony, and liable (20 & 21 Vict. c. 3) to penal servitude for seven years, or not less than three (now five) years. Compulsion shall be no excuse, unless the person, within four days after he has had opportunity, disclose the whole of the case to a justice of the peace; or, if a seaman or soldier, to his commanding officer. Compulsion, when excuse.

1091. By the 52 Geo. 3, c. 104 (to render the foregoing statute more effectual) it is enacted that every person who shall in any manner or form, administer or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind any Oaths to commit treason or felony.

person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction, be adjudged guilty of felony, and (7 Will. 4 & 1 Vict. c. 91, &c.) be liable (7) to penal servitude for seven years, and not less than [*five*] years, or to be imprisoned for not more than three years; and every person *taking* such oath, not being compelled thereto, shall be kept in penal servitude for life, or for such term of years as the court before which the offender be tried, shall adjudge. (7)

Military
training.

a misdemeanor.

1092. *Illegal training and drilling.* The 60 Geo. 3 & 1 Geo. 4. c. 1 (*sec.* 1) prohibits all meetings and assemblies, for the purpose of military training, without authority from His Majesty, or the lieutenant, or two justices of the peace: and every person present at such meeting, for the purpose of training or drilling others, shall on conviction be liable (20 & 21 Vict. c. 3) to penal servitude for seven, or not less than three (now *five*) years, or imprisonment for two years. Persons attending for the purpose of being trained, or who shall be trained or drilled to the use of arms, or to the practice of military exercise, movements, or evolutions, being legally convicted, shall be liable to fine and imprisonment not exceeding two years.

Riots,
route, and un-
lawful
assemblies.

1093. *Unlawful assemblies and riots.* It may be desirable to give the legal definition of these terms, (7) and to preface a brief statement of the law on these points, by the opinions of able lawyers, who at different periods have clearly expressed themselves as to the power and duty of military men and private persons, to interfere for the suppression of riots and riotous assemblies.

Unlawful
assembly;

riot.

1094. *An unlawful assembly* is when three or more do assemble themselves together (though they afterwards depart of their own accord, without doing anything), with an *intent* mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a *private* nature, with force of violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful: to constitute a riot, there must be, not only the unlawful assembly of three or more, but some act of violence, or at least such an apparent tendency thereto as

(7) A *route* is where three or more, make some advances towards the execution of the intended enterprise, constituting an unlawful assembly, do

may be naturally apt to strike terror into the people, as the show of arms, threatening speeches, or turbulent gestures. (9)

1095. But a riot is not less a riot, nor an illegal meeting less an illegal meeting, because the proclamation required by the riot act has not been read;—the effect of that proclamation being to make the parties guilty of a felony if they do not disperse within the hour. If it be not read, or in cases where provisions of the statute are not applicable, the common law offence remains, and it is a misdemeanor. (10)

Illegal meetings and riots are not constituted by the riot act.

1096. The following opinion was given by the first Lord Ellenborough, in 1801, being then attorney general, and was inserted in the Queen's Regulations (1) until the revision in 1873:—

Opinion of Lord Ellenborough.

“In case of sudden riot or disturbance” (the latter word being assumed to import a breach of the peace by an assembled multitude,) “*any* of His Majesty's subjects, without the presence of a peace officer of any description, *may arm themselves* and of course may use *ordinary means of force*, to suppress such riot and disturbance. This was laid down in my Lord Chief Justice Popham's reports, 121, and Keeling, 79, as having been resolved by all the judges, in the 39th of Queen Elizabeth, to be good law, and has certainly been recognized by Hawkins and other writers on the crown law, and by various judges at different periods since. And what His Majesty's subjects *may* do, they also *ought* to do for the suppression of public tumult, when an exigency requires that such means be resorted to. Whatever *any other class* of His Majesty's subjects may allowably do in this particular, the *military may unquestionably do also*. By the common law, every description of peace officer may, and ought to do, not only all that in him lies towards the suppression of riots, but may, and ought to command *all other persons* to assist therein. However it is by all means advisable to procure a justice of the peace to attend, and *for the military to act under his immediate orders*, when such attendance and the sanction of such orders can be obtained, as it not only prevents any disposition to unnecessary violence on the part of those who act in repelling the tumult, but it induces also, from the known authority of such magistrates, a more ready submission on the part of the rioters, to the measures used

Duty of soldiers to suppress riots and tumultuous assemblies.

(9) 1 Hawkins, 295.

(10) See § 1104.

(1) Q.R. (1868) 912.

for that purpose; but still, in cases of *great and sudden emergency, the military, as well as all other individuals, may act without their presence, or without any other peace officer whatever.*"

Opinion of Sir
James Mansfield.

1097. In 1802 Sir James Mansfield, chief justice of the common pleas, said: "Since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers, they cease to be citizens: a soldier is gifted with all the rights of other citizens, and he is as much bound to prevent a breach of the peace or a felony, as any other citizen. In 1780 this mistake extended to an alarming degree: soldiers, with arms in their hands, stood by and saw felonies committed, houses burnt and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them the command, and some because there was no justice of the peace with them. (2) It is the more extraordinary, because formerly the *posse comitatus*, which was the strength to prevent felonies, must, in a great proportion, have consisted of military tenants, who held lands by the tenure of military service. If it is necessary for the purpose of preventing mischief, or for the execution of the laws, it is not only the right of soldiers, but it is their duty to exert themselves in the assisting the execution of a legal process, or to prevent any crime or mischief being committed. It is, therefore, highly important that the mistake should be corrected, which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights or duties of an Englishman." (3)

Opinion of Lord
Chief Justice
Tindal on the
trial of the
Bristol rioters.

1098. The lord chief justice (Tindal) in his charge to the grand jury on the special commission at Bristol in 1831, said: "In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress

(2) On this occasion, the following general order was issued to all His Majesty's forces in Great Britain, and was publicly notified by a proclamation of the same day:—

"G. O. Adj.-Gen. Office, June 7, 1780.

"In obedience to an order of the King in council, the military are to act

without waiting for directions from the civil magistrate, and to use force for dispersing the illegal and tumultuous assemblies of the people."

"WM. AMHERST, A. G."

(3) Sir F. Burdett v. Speaker of the House of Commons, 4 Taunton, 449.

a riot by every means in his power. He may disperse or assist in dispersing those who are assembled: he may stay those who are engaged in it from executing their purpose: he may stop and prevent others, whom he shall see coming up, from joining the rest, and not only has he the authority, but it is his bounden duty as a good subject of the King to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against evil doers to keep the peace. Such was the opinion of all the judges in the time of Queen Elizabeth, in a case called 'the case of arms' (Popham's Reports, 121), although the judges add, 'that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King, in doing this.' It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities, until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination to, and concert with, the civil magistrate will be more effectual to attain the object proposed, than any efforts, however well intended, of separate and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility, in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object, will be supported and justified by the common law; and whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority, to preserve the peace of the King, as any other subject. If the one is bound to attend the call of the civil magistrates, so also is the other; if the one may interfere for that purpose, when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the

soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to, and in aid of, the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But where the danger is pressing and immediate,—where the felony has actually been committed or cannot otherwise be prevented, and, from the circumstances of the case, no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people.”

Opinion of Mr
Justice
Littledale

1099. On the trial of the Mayor of Bristol in the Court of King's Bench, on an information filed by the attorney general, charging the mayor with neglect of duty during the riots above referred to, Mr. Justice Littledale, in his charge to the jury, observed: “Then, gentlemen, another charge upon the mayor is, that upon being required to ride along with Major Beckwith, he did not do so. Gentlemen, in my opinion, he was not bound to do so in point of law. I do not apprehend that a justice of the peace is bound to ride along and charge with the military: I think he was not bound to do so; a military officer may act without authority of the magistrate, if he chooses to take the responsibility; but though that is the strict law, there are few military men who will take upon themselves to act without a magistrate, except on the most pressing occasion, where it is likely to be attended with a great deal of destruction of life;—a man, generally speaking, does not like to do it without the authority of a magistrate, though the authority need not be given by his presence. The mayor did give his authority to act,—the order has been given in evidence,—he requested Colonel Brereton to do what was necessary to preserve the peace. I should say, in point of law, a magistrate is not bound to ride with the soldiers, and more particularly on this occasion, where the presence of the mayor might be required to give general direction. If he made one charge, he must make as many other charges as the soldiers make. It is not in evidence that the mayor was able to ride: there is a surmise

that he had been seen on horseback ; but he was not a gentleman in the habit of riding. I am not certain whether some one person did not see him on horseback, but it is not only necessary to ride if you make a charge, but you must ride as soldiers do ; if you do not ride in a military manner, the probability is you would soon be unhorsed, and do more harm than good ; and more than that, if a man was to appear in a plain dress, heading the military, if the mob were disposed to resist, the mob would select him out to destroy him ; and I do not apprehend it is any part of the duty of a person who gives general directions, to expose himself to all kinds of personal danger. It is the case with generals in the army ; they do not consider it necessary to expose themselves to personal danger ; if his troops are defeated, a general officer may think it necessary for him to lead them on ; he may go and lead them, as being the first man ; but in general conduct of military manœuvres, it is not the practice for a general officer to expose himself in the front of the charge. I can see no reason why a magistrate should do it. I can conceive of a case where it might be prudent for a magistrate to do it, —where there was any likelihood of the military not succeeding for want of a magistrate ; but upon this occasion it was not necessary.” (1)

1100. From these several opinions it may be seen that it is required, by the laws of the land, of soldiers as of other the Queen's subjects, to assist in the suppression of riots, and that they may interfere without any warrant or sanction of the civil magistrate, for the prevention, and lawfully put to death persons in the actual commission, of felony, as the burning or destruction of houses, stacks, or shipping, if not able otherwise to restrain them. But as Mr. Justice Little-
dale remarked, “there are few military men who will take upon themselves to act, except on the most pressing occasions.” No doubt, as laid down in the “case of arms” [§ 1098], “it would be more discreet to be assistant to the justices ;” and in this view, the Queen's Regulations for many years have pointed out that “no officer is to go out with troops in the suppression of riot, the maintenance of the public peace, or the execution of the law, except upon the requisi-

Soldiers, as
other citizens
may suppress
riots.

(1) Published Report of the trial, hand report of Mr. Gurney, pp. 419, accurately transcribed from the short- 420.

tion of a magistrate, in writing"; (2) and further: "That the magistrate is to accompany the troops, and the officer is to remain near him:" that the officer "is not to give the word of command to *fire* unless distinctly required to do so by the magistrate:" "that the firing is to cease the instant it is no longer necessary, whether the magistrate may order the cessation or not." These instructions (3) obviously contemplate, that the magistrate, as well as the officer, will perform his duty zealously; but should a case arise, as at Bristol, where the safety of a city and the lives of thousands were endangered, the town being fired in several places, the public prisons forced or destroyed, and the prisoners set at large, there can be no doubt that the officer in command of the troops would not only be justified, but required to take upon him the responsibility which the magistrate, by not accompanying the troops, may decline; and which, as appears by Mr. Justice Littledale's charge, [§ 1099] he may do or not in his discretion. (4) What this learned judge remarked in his charge when referring to a magistrate or peace officer, entrusted with the duty of suppressing a riot, is more particularly applicable to the case of an officer in command of troops employed on such duty: "On the one hand, if he exceeds his power and occasions death, or the destruction of property or other violence or injury, he is liable to be proceeded against by indictment for murder or manslaughter, or as the case may happen to be. On the other hand, if he neglect his duty and does not do enough, he is liable to be proceeded

(2) Confidential instructions, dated 27th March, 1835; afterwards embodied in the Queen's Regulations. They were repeated on the revision of the regulations in 1868, with the most important addition (*para.* 914) "or in cases of *great and sudden* emergency." These words appear in the revised regulations (*S.8*, p. 74,) a reference to *para.* 912, quoted above, § 1096, being omitted.

(3) Q.R.S.8, p. 75, 77, 81.

(4) The following extracts from a communication made by the secretary of state for the home department, were circulated in the northern district some

years since by the major general who then held the command. They point out that the military may legally act—

1st.—"For their own defence, and then the necessity must, of course, be decided by their own officer."*

2nd.—"In aid of the civil power, in which case they must be accompanied by a magistrate."

3rd.—"In the aid of the owner of property, attacked by a riotous mob, in which case the owner may delegate to the soldier the exercise of the right of defence, which belongs to himself, and which he may equally delegate to any friend or servants."

* It must be remembered, that the officer, in these cases, acts at his own peril, and that he may be called on to justify himself before the civil tribunal.

against, as charged in this information, for a criminal neglect of duty. You will take into consideration the circumstances in which a man is placed,—he is bound to hit the exact line between an excess and doing what is sufficient,—there is only one precise line, and how difficult it is, in cases of riots of this kind, to hit that line :—that will be taken into account in considering this case. Still, however, in point of law he is bound to do it; and though you will give a very lenient consideration to it, it is for you to consider whether he has hit that precise line or not.” (5)

1101. By the definition before quoted [§ 1094], three persons are essential to a riot: therefore, if the evidence fail as to all but two they are necessarily freed. Women are punishable as rioters, but not infants under the age of discretion. (6) The intended *enterprise* must be of a *private* and not of a public nature; if *public*, as to redress public grievance, it amounts to high treason, but [§ 1076] it may be charged as felony only. One of the rioters at Bristol indicted for felony in attacking the public prisons, pleaded that the offence was treason, not felony, as he had openly declared that he would destroy *all* the prisons in the kingdom. The judge overruled the objection, admitting that the offence was treasonable, but asserting that still it might also be felony.

Further remarks
as to riots.

1102. The punishment for a riot at common law is fine or imprisonment, or both; and by the 3 Geo. 4, c. 114, such imprisonment may, if the court think fit, be with hard labour.

Riot, a misdemeanor,
punishable by
fine and
imprisonment,
or both.

1103. If the persons tumultuously assembled are above the number of twelve, even although a riot may not have been as yet committed, (8) the 1 Geo. 1, st. 2, c. 5, commonly called *the riot act*, becomes applicable. Magistrates generally have recourse to this statute in suppressing riotous assemblies, but, as before shown, it is still competent to them by the common law to suppress such assemblies without resorting to it; and in extreme cases not admitting delay, it is obviously their duty to do so. By the first section, if any *twelve* persons or more are unlawfully, riotously, and tumultuously assembled together, so that the peace is disturbed, or is about to be disturbed, any justice of the peace may, if he think fit, direct the constables to suppress the assembly, and if they refuse to do so, he may appoint other persons to do so, and may punish any person who refuses to obey such order.

Riot act renders
an unlawful
assembly felonious, in the circumstances
therein set forth.

(5) Printed report of the trial, pp. 397, 398.

(8) *R. v. James*, 5 Carrington & Payne, 153.

(6) 1 Hawkins, 299.

Rioters remaining one hour together after proclamation.

Form of proclamation, commonly called "reading the riot act."

Justices may call upon all persons to assist,

and such persons are indemnified in the event of any loss of life.

Resisting reading of proclamation.

tuously assembled, *to the disturbance of the public peace*, and any one justice of the peace, or the sheriff of the county or his under-sheriff, or the mayor, bailiff, or other head officer of any city or town corporate, shall require or command them, by proclamation in the Queen's name, to disperse; and if, to the number of twelve or more, notwithstanding such proclamation made, they continue together *for an hour afterwards*, such continuing together shall be felony. The second section enacts, "That the order and form of the proclamation that shall be made by the authority of this act shall be as hereafter followeth; (that is to say) the justice of the peace, or other persons authorized by this act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making, and after that, shall openly, and with a loud voice, make or cause to be made, proclamation of these words, or like in effect." "*Our sovereign lord the King (Queen) chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George the First, for preventing tumults and riotous assemblies. God save the King*" (Queen). (9) The third section requires every justice of the peace, and all peace officers are required to seize, and are authorized to call on all Her Majesty's subjects of age and ability to assist in seizing such persons as unlawfully continue assembled one hour after the proclamation is made, in order to their being carried before one or more justices of the peace, to the end that they may be proceeded against according to law; and if they make resistance, and happen to be killed, maimed, or hurt, then every justice of the peace, peace officer, and all and singular persons being aiding and assisting to them, are indemnified, as well against the Queen's majesty as against all and every other person of, for, or concerning such killing, maiming, or hurting. If the reading of the proclamation be by force opposed, or the person making or going to make proclamation be in any manner wilfully hurt or hindered

(9) The corresponding Irish act was "made in the twenty-seventh year of King George the Third."

from the reading of it, the persons opposing, hindering, or hurting, and also all persons to whom such proclamation ought to have been made, continuing together for one hour after such let or hindrance, and knowing of such hindrance, are declared felons. The 7 Will. 4 & 1 Vict. c. 91, and the 9 & 10 Vict. c. 24, s. 1, for the punishment of death provided by this act, substituted (20 & 21 Vict. c. 3 and 27 & 28 Vict. c. 47, s. 2) penal servitude for life, or not less than three (now *five*) years, or imprisonment not exceeding three (now *two*) years, with or without hard labour and with or without solitary confinement. Prosecutions, under the act, are limited to twelve months; and damage done by rioters is to be made good by the inhabitants, and to be recovered by the procedure therein directed.

Punishment of felonies under the riot act.

Limitation of prosecutions.

1104. Lord Loughborough, then chief justice of the common pleas, in his charge to the grand jury on the special commission in consequence of the riots of 1780, which have been already referred to, made the following remarks, which very clearly point out the legal effect of the riot act:—"I take this public opportunity of mentioning a fatal mistake into which many persons have fallen. It has been imagined, that because the law allows an hour for the dispersion of a mob, when the riot act has been read by the magistrate, the better to support the civil authority, that during that time the civil power and the magistracy are disarmed, and the King's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the legislature, nor does the operation of the act warrant such effect. The civil magistrates are left in possession of all those powers which the law had given them before. If the mob collectively, or a part of it, or any individual, within or before the expiration of that hour, attempts, or begins to perpetrate an outrage amounting to felony, (10) to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender." (1)

Remarks by Lord Loughborough on the riot act.

It does not apply to cases where danger is imminent, or violence has begun.

1105. BREAKING QUARANTINE.—The acts on this subject were repealed, and the laws of quarantine consolidated in the

QUARANTINE.

(10) See as to riotously and tumultuously destroying property, § 1217, 1218. (1) 21 Howell's *State Trials*, 486.

Penalty on commanders quitting vessels when subject to quarantine, &c.

Penalty on passengers ;

Refusing to repair to, or breaking from any lazaret.

Landing goods, letters, wearing apparel, &c.

HOMICIDE of three kinds ;

felonious and punishable ;

justifiable, or excusable, and in neither case incurring any penalty.

Justifiable homicide ; when in

6 Geo. 4, c. 78. The provisions in this statute are numerous ; but it is only necessary to observe, that breaking quarantine is no longer a felony punishable by death, such punishment being superseded by the following provisions : Commanders or masters (2) of vessels liable to quarantine, are prohibited from quitting the vessel under quarantine, or from permitting any person whatever to do so, under a penalty of four hundred pounds. Passengers or other persons arriving in such vessels, or going on board them and quitting them before discharged, and landing or attempting to land in the United Kingdom, are subject to an imprisonment of six months and a penalty of three hundred pounds. Persons refusing to repair to a lazaret, or breaking therefrom, are liable to a penalty of two hundred pounds. *Landing*, or receiving from vessels under quarantine, goods, merchandize, luggage, wearing apparel, books or letters, is punishable by a penalty of five hundred pounds ; and conveying, secreting, or concealing for the purpose of conveying such articles from a vessel under quarantine, or from any lazaret, is punishable by a fine of one hundred pounds.

1106. Offences against the persons and property of individuals are next to be considered. The law as to feloniously killing a human creature is admittedly most imperfect ; (3) but before adverting to *felonious* homicide it may be advisable to mention those cases in which causing the death is free from legal guilt, the circumstances being such as render it either *justifiable*, or, at least, *excusable*. (4)

1107. JUSTIFIABLE HOMICIDE is where the killing arises from *necessity* imposed by law, (5) as when the proper officer

(1) There is one offence which it may be as well to notice, as it has been committed where the only existing judicature was a court martial (at Monte Video, in 1807), and may again occur in similar circumstances. By the Merchant Shipping Act, 1854, s. 206, it is enacted : " If any master or any other person belonging to a British ship wrongfully forces on shore and leaves behind, or otherwise wrongfully and wilfully leaves behind, in any place, on shore or on sea, in or out of Her Majesty's dominions, any seaman or apprentice belonging to such ship, before the completion of the voyage for which such person was engaged, or the return of the ship to the

United Kingdom, he shall for each such offence be deemed guilty of a misdemeanor,"—punishable (*sec.* 518) by fine, or imprisonment with or without hard labour.

(3) A bill to amend the law of homicide was brought in by Mr. Russell Gurney, and read a second time on 24th March 1874, but a select committee reported that it was not desirable to proceed with it.

(4) By the 24 & 25 Vict. c. 100, s. 7 (§ 1111), there is no penalty on a finding of excusable homicide, and consequently there is no practical distinction between justifiable and excusable homicide.

(5) 4 Blackstone, 178-180.

executes a criminal in strict conformity with his sentence ; (6) or from the act of the person killed as if having actually committed a felony, he will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those persons who pursue him, whether private persons or public officers, with or without a warrant from a magistrate. So, if an innocent person be indicted for a felony, and will not suffer himself to be arrested by *the officer*, who has a *warrant* for that purpose, he may lawfully be killed by him, if he cannot otherwise be taken ; for there is a charge against him, to which, at his peril, he is bound to answer. If a prisoner endeavouring to break gaol assault his gaoler, or going to a gaol resist the officer, he may be lawfully killed in the affray. (1) In civil causes, though the sheriff cannot kill a man who flies from the execution of a civil process, (2) yet, if he resist the arrest, the sheriff or his officer is not bound to give back, but may stand his ground and attack the party ; (3) and, if in the affray he unavoidably kills him, he is justified. (4) In case of a riot, or seditious assembly, the officers and persons assisting to disperse the rioters, are justified in killing them, both at common law, (5) and by statute. (6) In all these cases the necessity must be apparent ;—that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed ; otherwise, without such absolute necessity, it is not justifiable. (7)

advancement
of public
justice,
or where
a person
suspected of
felony, and
resisting
arrest may
be lawfully
slain ;

breaking gaol ;

resisting a civil
process ;

rioters ;

but if no reason-
able neces-
sity for the
violence used,
the killing
may be mur-
der, and at
the least
manslaughter.

1108. Homicide, when committed for the *prevention* of any forcible and atrocious crime, is justifiable by the law of nature as well as by the law of England ; as if a person attempt the robbery or murder of another, or attempt to break open a house *in the night time* (and the like extends to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted (8) and discharged : and this extends not

For prevention
of felony ;

killing robbers
and burglars ;

(6) 1 Hawkins, 105. 1 Blackstone, 178.

(1) 1 Hawkins, 106. No private person, of his own authority, can arrest a man for any other matter as he may for felony.—Ib. 108.

(2) 1 Hawkins, 108.

(3) Id. 107.

(4) Ib.

(5) Id. 108.

(6) 1 Geo. 1, st. 2, c. 5 ; before § 1103.

(7) 4 Blackstone, 180.

(8) In the case of forcible misdemeanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet if he kill him it will be manslaughter ;—or if, instead of beating him, he attack him with a

killing
ravishers.

only to members of the same family, but also to strangers who may be accidentally present. (1) A woman is justified in killing one who attempts to ravish her; and so too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he take them in adultery by consent, for the one is forcible and felonious, the other not. This reaches not to any misdemeanor nor to felonies unaccompanied with force, as picking of pockets, or the breaking open a house in the daytime, unless it carry with it an attempt of robbery, murder, or the like, and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, otherwise the homicide will be manslaughter at least, if not murder. (2)

Homicide
excusable,

by misad-
venture;

as when
killing by
accident;

but not when
by some act
likely to breed
danger, or
done with
a mischievous
intent.

Killing by
correction.

Further defini-
tion of homicide
by misadventure,

§ 1109. EXCUSABLE HOMICIDE is either by misadventure, or in self-defence upon a sudden affray. Homicide by *misadventure* is, where a man doing a *lawful* act without intent to hurt another, and death casually ensues; as where a man is at work with a hatchet, and the head flies off and kills one who stands by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; or where a third person whips a horse on which a man is riding, whereupon he springs out and runs over a child and kills him; in which case it is homicide, by misadventure in the rider, and he who gave the blow is guilty of manslaughter. (3) But if a person riding in the street whip his horse, and put him into speed, and run over a child and kill him, it is homicide, and not by misadventure; and if he ride so in a press of people, with intent to do hurt, and the horse killeth a person, it is murder in the rider. (4) When a parent is moderately correcting his child; a master his apprentice or scholar; or an officer is punishing a criminal, and happen to occasion death, it is only misadventure: yet if such persons, in their correction, exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment,

deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from his trespass.—Hale, cited Archbold, 690.

(1) 1 Hale, 481, 484. Foster, 274.

(2) In cases within the rule, the party whose person or property is

attacked is not obliged to retreat, as in other cases of self-defence (§ 1110), but may even pursue the assailant until he finds himself or his property out of danger.—Foster, 273.

(3) 1 Hawkins, 111.

(4) 1 Hale, 476. Compare § 1138.

and death ensue, it is manslaughter at the least, and in some cases (according to circumstances) murder. (5) It will thus be seen, that homicide by misadventure is only when death ensues upon a man's doing a lawful act; for if the act be done in prosecution of a felonious intention, it will be murder. (6) If a person shoot at another's poultry, with a design to *steal* them, and accidentally kill a man, it is murder, because the intent is felonious. (1) And, in general, if death ensue in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing; in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts; (2) and if death accidentally ensue in the execution of an unlawful act amounting to *felony*, it is murder. (3) Such manly sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not deemed unlawful; but prize fighting, public boxing matches, or any other sports of a similar kind which are exhibited for lucre, and tend to encourage idleness, by drawing together a number of disorderly people, have met with a different consideration. (4)

only in lawful act,

as in manly sport.

1110. Homicide upon a sudden fray is, by the English law, matter of excuse, rather than of justification. It must be distinguished from that species of self-defence, just now mentioned (§ 1108), in hindrance of an atrocious crime, and where the slayer is free from all blame. It is when a man protects himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. The right of natural defence does not imply a right of attacking; for instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventive defence, but in sudden and violent

Homicide on sudden affray.

(5) 1 Hawkins, 111. 1 Leach, 410. Governor Wall was executed in 1802, after an interval of nearly twenty years, for the murder of Serjeant Benjamin Armstrong, of the African Corps, at Goree, in 1782; and the point, on which the conviction chiefly rested, was his having inflicted the sentence of a drum-head court martial with a rope one inch in *diameter*, instead of the usual cat-o'-nine-tails. 28 Howell's *State Trials*, 165.

(6) 1 Hawkins, 113.
 (1) 1 Hawkins, 126.
 (2) 4 Blackstone, 182.
 (3) 1 Hawkins, 126.
 (4) 1 East, 270.

cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant. It is frequently difficult to distinguish homicide in self-defence upon sudden affray, from manslaughter, in the legal acceptation of the word. But the true criterion between them seems to be this: when both parties are actually combatting at the time when the mortal stroke is given, or the slayer was not in immediate danger of death, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun, and that not from malice prepense) declines or endeavours to decline any further struggle, and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction; this is homicide excusable by self-defence. Under this excuse of self-defence, the principal civil and natural relations are comprehended, therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the person assisting being construed the same as the act of the party himself. (5)

No punishment now attaches to homicide by misfortune or in self-defence.

1111. The 24 & 25 Vict. c. 100, s. 7, declares that "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony."

Felonious homicide:

1112. Felonious homicide is the killing a human creature, (6) of any age, without justification or excuse; and this may be either *manslaughter* [§ 1113] or *murder* [§ 1116].

(5) 4 Blackstone, 186.

(6) A *felo de se* is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death; as if attempting to kill another, he runs upon his antagonist's sword; or shooting at another, meets his death by the bursting of the gun. That degree of insanity which relieves a man from punishment for depriving another of life, will alone exempt him who has committed suicide from being legally judged *felo de se*.

Suicide admits of accessories before the fact, as well as other felonies; for if one persuades another to kill him-

self, and he does so, the adviser is guilty of murder as an accessory, if absent; if present, such person is guilty of murder as a principal: and if two encourage each other to murder themselves, and one does so, the other being present, but failing in the attempt on himself, the latter is a principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident, before the moment when he meant to destroy himself, it will not be murder in either. As to attempts to commit suicide, see § 1127 & 249.

1113. MANSLAUGHTER is the unlawful killing of another, without any malice, either express or implied. The felony may be either *voluntary*, upon a sudden heat; or *involuntary*, when in the commission of some unlawful act, not amounting to felony. First, as to *voluntary* manslaughter;—if, upon a sudden quarrel, two persons fight and one of them kill the other; that is manslaughter. (7) But even sudden quarrel may be attended with such circumstances as will indicate malice on the part of the party killing: and the killing then would be murder and not merely manslaughter. If, for instance, the party killing began the attack with circumstances of undue advantage—as if *A* and *B* quarrel, and *A* draw his sword and make a pass at *B*, and *B* thereupon draw his sword, and they fight, and *B* is killed, *A* would be guilty of murder; for his making the pass before *B* had drawn his sword, shows that he sought his blood. (8) Again, if there was deliberation, as that they met the next day; nay, though it were the same day, if there were such a competent distance of time that, in common presumption, they had time of deliberation, then it is murder. (9) And the law so far abhors all duelling in cold blood, that not only the principal, but his seconds, are guilty of murder; and it is held, that the seconds of the deceased are likewise guilty. (1) If a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kill the aggressor, though this is not excusable in self-defence, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice, but it is manslaughter. So if a man takes another in the act of adultery with his wife, and kills him directly on the spot, it is manslaughter. It is, however, the least degree of it; and therefore, in such a case, the court directed the burning of the hand (then a part of the penalty for manslaughter and other felonies not punished with death,) to be gently inflicted, because there could not be a greater provocation. (2) The father was guilty of manslaughter only, who seeing his son's nose bloody, and being told by him that he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat

manslaughter.

Killing by fighting on a sudden quarrel,

where no advantage is unfairly taken, is reduced to manslaughter,

unless sufficient time for the passion to cool, and then murder.

No provocation can render homicide excusable; it may reduce it to manslaughter,

(7) 4 Blackstone, 191.

(8) Foster, 295.

(9) 1 Hale, 453.

(1) 1 Hawkins, 124. 1 East, 242.

See before, § 835(8).

(2) 4 Blackstone, 191.

and it is murder,
if any evidence
of express
malice.

him with a small cudgel, whereof he afterwards died. (3) Manslaughter, therefore, on a sudden provocation, differs from *excusable homicide in self-defence*, in this, that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other case, no necessity at all, being only a sudden act of revenge, which, from the absence of express malice, is not adjudged to be murder. (4)

Involuntary
manslaughter

1114. Secondly, as to *involuntary manslaughter*. [§ 1113] It differs from homicide excusable by misadventure in this, that misadventure happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful act. As the trespasser killing another when shooting at deer in a third person's park, is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection; as when a workman flings down a stone or piece of timber into a street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances when the original act was done; if it were in a country village, where there are few passengers, and he calls out to all people to have a care, it is a misadventure only; but if it were in London, or in a populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or if, in its consequence, it naturally tend to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. (5)

Punishment of
manslaughter.

1115. "Whoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three (now *five*) years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, or to pay such

(3) 1 Hawkins, 125.

(4) See § 1110.

(5) 4 Blackstone, 193.

fine as the court shall award, in addition to, or without any such other discretionary punishments as aforesaid." (6)

1116. MURDER (7) is the unlawful killing of a human being (8) *with malice aforethought*;—malice (express or implied) is its essential characteristic, distinguishing this crime from justifiable or excusable homicide, and from such cases of felonious homicide as, not having this, are reduced to manslaughter. Murder defined,

constituted by malice.

1117. The cause of death does not now (9) need to be stated in the charge; it is enough if the killing be proved to arise from poisoning, striking, starving, suffocating, drowning, or in whatever other form the death may have been brought about. Also, if a man do such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air against his will, by reason whereof, he died; of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance; and of the master, who refused necessary food to his apprentice, and treated him with such continued severity as to occasion his death. (1) In order to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or after the doing of whatever act may have been the cause of death; in the computation of which, the whole day upon which the injury was done, shall be reckoned the first. (2) The unlawful killing may be caused by any manner or means,

and this although not intended to have a fatal result.

1118. Malice, when technically used in legal descriptions of crime, is to be understood as a wicked intention to do injury—rather than in its restricted and more usual signifi- Death must ensue within a year and a day, to render killing murder.

Legal 'malice' arises from a wicked intention to do injury

(6) 24 & 25 Vict. c. 100, s. 5.—Form of charge.—"For having at _____ on (or about) _____ feloniously killed and slain (the deceased)."

(7) Form of charge.—"For having at _____ on (or about) _____ feloniously, wilfully, and of malice aforethought, killed and murdered _____."

(8) This does not include killing a child in its mother's womb; for which offence, *see* hereafter, § 1151-2.

(9) "In any indictment" and—by consequence, in any charge—"for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to

set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." 24 & 25 Vict. c. 100, s. 6.

(1) 4 Blackstone, 196.

(2) 3 Hale, Institutes, 47.—Otherwise it is an injury with intent to murder.—*See* hereafter, § 1125-7.

rather than
from settled
anger against
a particular
person.

cation of the passion of malice.(3) The *malice aforethought* (or *prepenſe*) which is neceſſary to conſtitute murder is not ſo much ſpite or malevolence to the deceased individually, “as any evil deſign in general;” and it is either *expresſe* or *implied*.(4)

Malice expreſs;
or ill-will
againſt another
by words or
actions;

1119. Expresſe malice, or malice in fact, is where there is a deliberate and formed deſign of taking away the life of a fellow-creature, which is manifeſted by external circumſtances capable of proof; as lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do him ſome bodily harm. If a perſon kill another in conſequence of ſuch a wilful act as ſhows him to be an enemy to all mankind in general, as coolly diſcharging a gun amongſt a multitude of people: and, if two or more come together to do an unlawful act againſt the King’s peace, of which the probable conſequence might be bloodſhed, as to beat a man, to commit a riot, or to rob a park, and one of them kills a man, it is murder in them all, becauſe of the unlawful act, *malitia præcogitata*, or evil intended beforehand.(5)

or againſt
ſociety, by
deliberately
doing a dan-
gerous act,

or in the pro-
ſecution of an
unlawful
purpose.

Malice implied,

1120. Implied malice is inferred from the nature of the act. If a man kill another without any, or without a conſiderable provocation, the law implies malice. No affront by words or geſtures only is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder. In like manner, if one kills an officer of juſtice, either civil or criminal, in the execution of his duty, or any perſons acting in aid of him in endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray or apprehend a felon, knowing his authority or the intention with which he interpoſes, the law will imply malice, and the killer will be guilty of murder. And if one

by circum-
ſtances ſhowing
an intention to
kill or do ſome
grievous bodily
harm upon a
ſlight provoca-
tion,

or by killing
an officer of
juſtice, or
others in the
execution of
their office or
duty,

(3) “Some have been led into miſtake by not well conſidering what the paſſion of malice is; they have conſtrued it to be a rancour of mind lodged in the perſon killing, for ſome conſiderable time before the commiſſion of the act, which is a miſtake

ariſing from not well diſtinguiſhing between *hatred* and *malice*; envy, hatred, and malice are three diſtinct paſſions of the mind.” By Lord Holt, C. J.

(4) 4 Blackſtone, 198, 199.

(5) 4 Blackſtone, Com. 200.

intends to do a felony, and undesignedly kills a man, this is also murder. Thus, if one shoots at *A* with felonious intent, and misses *him*, but kills *B*; this is murder, because of the previous intent, which the law transfers from one to the other. The same is the case where one lays poison for *A*; and *B*, against whom the prisoner had no malicious intent, takes it, and it kills him. (6)

or by an intended felony, although not designed to cause death.

1121. It were endless to go through the cases of homicide which have been adjudged either expressly, or impliedly, malicious; but we may take it as a settled rule that, unless the contrary appear, the law presumes *all* wilful and illegal homicide to be malicious, and consequently to amount to murder. It is for the prisoner to bring forward such facts and circumstances as may prove the homicide to be justifiable, or excusable, or that it amounted to no more than manslaughter, being either the involuntary consequence of some act, not strictly lawful, or, if voluntary, occasioned by some sudden and sufficiently violent provocation. (7)

The law presumes malice in all cases of homicide, which it does not command, but the prisoner may rebut this presumption.

by making out circumstances of justification, excuse, or alleviation.

1122. The act to consolidate and amend the statute law relating to offences against the person, 24 & 25 Vict. c. 100, enacts (*sec.* 1), "Whosoever shall be convicted of murder shall suffer death as a felon." (8) (*Sec.* 2) "Upon every conviction for murder the court shall pronounce sentence of death." (9) Courts martial, however, as already observed, [§1052] unlike the judge in an ordinary court, are author-

24 & 25 Vict. c. 100, Murder.

Peremptory sentence of death in civil courts, but discretionary before courts martial.

(6) 4 Blackstone, 200.

(7) 4 Blackstone, 201. Before, § 879, 880. It may be observed, that, provided the court martial has jurisdiction in cases of murder where it may be sitting, it is immaterial whether the murder was actually committed or the death took place within or without the Queen's dominions, on land or on sea. —See § 10; compare 24 & 25 Vict. c. 100, ss. 9, 68. M.A. 1 & 6.

(8) This act also provides (*sec.* 67) that "every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour." As to accessories in general, see § 1060-64.

(9) "An act for the more speedy trial of certain homicides committed

by persons subject to the mutiny act." 25 & 26 Vict. c. 65 was passed in 1862, in consequence of the so-called *military murders*, and a reluctance to apply the existing provisions of the mutiny act where applicable, or to extend them to those cases where the sufferer was not a superior officer, or not in the execution of his office. It provides that, under a judge's order, where the prisoner and the deceased were both subject to the mutiny act, the prisoner may be removed to London or Dublin, and there tried with all convenient speed, and, if convicted, may be sentenced to be punished in the county where the offence was committed,—not at the place, as was decided in the case of Sapper John Currie, who was hung at Maidstone County Jail for the murder of Major de Vere, R. E., at Chatham, on the 11th August, 1865.

24 & 25 Vict.
c. 100.

Offences
against the
person not
resulting in
actual homicide.

Conspiring or
soliciting to
commit
murder.

ATTEMPTS TO
MURDER.
Administering
poison, or
wounding with
intent to
murder.

Attempting
to administer
poison, or

shooting or
attempting
to shoot, or

ised to award penal servitude instead of awarding the capital sentence.

1123. In addition to the provisions relating to murder and manslaughter, the above-cited statute, enacted in 1861, very much simplified the law as to other offences against the person, of which the following are the most likely to come in question before courts martial.

1124. *Sec. 4.* "All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor," and liable to penal servitude for not more than ten and not less than three (now *five*) years,—or to imprisonment not exceeding two years, with or without hard labour.

1125. *Sec. 11.* "Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever (1) wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony," (2) and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment for not exceeding two years, with or without hard labour and with or without solitary confinement.

1126. *Sec. 14.* "Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or

(1) Destroying or damaging a building with gunpowder (*sec. 12*), or setting fire to or casting away a ship (*sec. 13*) with intent to murder, are punishable in the like manner.

(2) By the 14 & 15 Vict. c. 19, s. 5, If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or

wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding.

in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years,—or to imprisonment not exceeding two years as above, § 1125.

24 & 25 Vict.
c. 100.
attempting to
drown, &c.,
with intent to
murder.

1127. *Sec. 15.* "Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony," (3) and liable to penal servitude for life or not less than three (now *five*) years,—or imprisonment as above, § 1125.

By any other
means at-
tempting to
commit murder.

1128. *Sec. 16.* "Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony," and liable to penal servitude for not exceeding ten years, nor less than three (now *five*) years,—or to imprisonment, as above, § 1125.

Sending letters
threatening to
murder.

1129. *Sec. 18.* "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony," and liable to penal servitude for life or for not less than three (now *five*) years, or to imprisonment, as above, § 1125.

Shooting or
attempting
to shoot, or
wounding with
intent to do
grievous
bodily harm.

1130. *Sec. 19.* "Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this act, although the attempt to discharge the same may fail from want of proper priming or from any other cause." (4)

What shall
constitute
loaded arms.

1131. *Sec. 20.* "Whosoever shall unlawfully and maliciously

Inflicting
bodily injury,
with or without
weapon.

(3) This section applies to infernal machines, and has been held to justify a conviction for an attempt to commit suicide. *See* § 249.

meet every case where a prisoner attempts to discharge a loaded rifle, &c., but which misses fire for want of priming, cap, or other like cause.—*Greaves*, p. 32.

(4) This clause was introduced to

24 & 25 Vict.
c. 100.

wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and liable to penal servitude for three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour.

Attempting to
choke, &c., in
order to commit
any indictable
offence.

1132. *Sec. 21.* "Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases, thereby to assist any other person in committing, any indictable offence, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years,—or to imprisonment not exceeding two years, with or without hard labour. This punishment having been found insufficient to deter from crimes of violence, it was enacted in 1863 by "An Act for the further security of the persons of Her Majesty's subjects," (26 & 27 *Vict. c. 44*) that any person convicted under either this section, or the forty-third section of the 24 & 25 *Vict. c. 43* [§ 1175], may be once, twice, or thrice, privately whipped, if under sixteen with twenty-five strokes of a birch rod, and in the case of any other male offender with fifty strokes—the court in its sentence specifying the number of strokes and the instrument, and such whipping to take place within six months after passing the sentence.

Whipping male
garotters.

Using chloro-
form, &c., to
commit any
indictable
offence.

1133. *Sec. 22.* "Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt or cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment, as above, § 1132.

Maliciously
administering
poison, &c., so
as to endanger
life.

1134. *Sec. 23.* "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing,

so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony," (5) and liable to penal servitude not exceeding ten years nor less than three (now *five*) years, or to imprisonment, as above, § 1132.

24 & 25 Vict.
c. 100.

grievous
bodily harm.

1135. *Sec. 24.* "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, shall be guilty of a misdemeanor," and liable to penal servitude for three (now *five*) years or to imprisonment, as above, § 1132.

Malignantly
administering
poison, &c.,
with intent to
injure, aggrieve,
or annoy any
other person.

1136. *Sec. 28.* "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Causing bodily
injury by
gunpowder.

1137. *Sec. 29.* "Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive (6) or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony," and liable to penal servitude for life or for not less than three (now *five*) years,—or to imprisonment, as above, § 1136.

Causing
gunpowder to
explode,
or sending to
any person an
explosive sub-
stance, or
throwing
corrosive fluid

on a person,
with intent to
do grievous
bodily harm.

1138. *Sec. 35.* "Whosoever, having the charge of any (7)

Drivers of
carriages in-

(5) If the court be not satisfied that any person charged under this section is guilty of felony, but shall be satisfied that he is guilty of the misdemeanor in section 24, they may find him guilty accordingly.—*Sec. 25.*

(6) Boiling water held to be "destructive."—*Reg. v. Crawford*, 2 Carington and Keane, 129.

Unlawfully throwing wood, &c. upon, or otherwise obstructing a railway with intent to endanger safety, is (*sec. 32*) a felony punishable by penal servitude for life.

(7) The 1 Geo. 4, c. 4, from which this clause is taken, was confined to stage-coaches and public carriages.

24 & 25 Vict.
c. 100.

juring persons
by furious
driving.

carriage or vehicle, shall, by wanton or furious driving or racing or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor," and liable to be imprisoned for any term not exceeding two years, with or without hard labour.

ASSAULTS.

Assault a minor
offence included
in crime
attended with
violence.

1139. An assault is an *attempt* or *offer* to commit any forcible crime against the person of another, such as battery, murder, robbery, rape, and so forth. It may be found when the evidence fails to prove the greater offence charged against the prisoner, and is an offence punishable at common law, by fine or imprisonment, or both, the measure of which, except in cases expressly provided for by statute, is at the discretion of the court. As to assaults the act provides (*sec. 38*), "Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist, to prevent the lawful apprehension or detainer of himself or any other person for any offence, shall be guilty of a misdemeanor" and liable to imprisonment not exceeding two years with or without hard labour. (*Sec. 47.*) "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three (now *five*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault (8) shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour."

Assaults with
intent to
commit felony,
or resist
peace officers,
or resist
apprehension.

Assaults
occasioning
bodily harm.

Common
assault.

Unnatural and
indecent
assaults, and
offences against
the person of
women.

1140. The crimes of sodomy, rape, and defilement of women and children are so clearly and succinctly noticed in the sections of the 24 & 25 Vict. c. 100, which follow, that it would be scarcely possible to compress their meaning into briefer terms. Indeed the adaptation of language to that horrible crime, which our law describes in its very indictments as unfit to be named amongst Christians, would be of itself so painful as to render the adoption of technical

(8) Mere words cannot in any case amount to an offence against the person, but striking at another (without hitting), with or without a weapon, or any other act indicating an intention to use violence, is an *assault*.

terms desirable. The difficulties formerly attending the conviction in cases of this crime, and of rape, from the peculiarity of the facts requisite to be given in evidence, are obviated by the following enactment, which was called for as much by public decorum as to prevent failures of justice. (*Sec. 63.*) "Whenever upon the trial of any offence punishable under this act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

24 & 25 Vict.
c. 100.

Carnal
knowledge
defined.

1141. Rape is defined to be the carnal knowledge of a woman without her consent. The woman ravished is a competent witness, but the credibility of her testimony, and how far she is to be believed, must be left to the jury, upon the circumstances of fact that concur in that testimony; for instance, if the witness be of good fame; if she presently discover the offence, and make search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence; but, on the other side, if she be of evil fame, (9) and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the act was alleged to have been committed, was where it was possible she might have been heard and she made no outcry, these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false or feigned. (10) The admissibility of the evidence of a child, under ten or twelve years of age, on whom this crime may have been committed, rests, as in other cases, on the development of her mental faculties, and on her capability to judge of the consequences of perjury. Actual force is necessary to constitute the crime of rape; it was held by a majority of the judges, that having carnal knowledge of a married woman, with circumstances that induced her to

Definition of
rape;

party ravished
may give
evidence;

a child on
whom the
offence may be
perpetrated
is competent
to give
evidence;

actual force
necessary to
constitute
rape;

(9) It is no excuse that the woman is a common strumpet, or the concubine of the ravisher, although the evidence would need, in such case, to be proportionably strong.—1 *Hale*, 729. The common law does not take into consideration the moral character of the complaining party, except so far as it may lead to the inference that the

aggressor did not comprehend the true nature of the injury. No extremity of self-degradation can ever deprive a woman of the right to re-assert and make others respect the natural dignity of her sex. See *Phillips, Jurisprudence*, s. 184.

(10) 4 *Blackstone*, 213.

24 & 25 Vict.
c. 100.

Except in
case of idiot.

A male under
fourteen can-
not commit
rape.

Punishment
of rape.

Procuring the
defilement of
girl under age.

Carnally
knowing a
girl under
ten years of
age.

Carnally
knowing a
girl between
the ages of ten
and twelve.

Attempts to
commit abuse of
girls, or rape.

suppose that the offender was her husband, does not amount to rape. (1) On the other hand, the Court of Crown Cases Reserved affirmed a conviction at the Leeds summer assizes 1873, for an attempt at rape (evidence of the completion of the offence being insufficient), where there was no evidence of force being used, but the idiocy of the prosecutrix was so great that she was incapable of expressing assent or dissent. (2) A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, (3) and therefore must be acquitted if tried as a principal in the first degree, but he may be convicted of an assault, and may, as may also the woman's husband, or a woman, be a principal in the second degree, and punished in like manner as the actual perpetrator for aiding and abetting. (4)

1142. *Sec. 48.* "Whosoever shall be convicted of the crime of rape shall be guilty of felony," and liable to penal servitude for life, or for not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour.

1143. *Sec. 49.* "Whosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years, to have illicit carnal connection with any man, shall be guilty of a misdemeanor," and liable to imprisonment as above, § 1142.

1144. *Sec. 50.* "Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years, shall be guilty of felony," (5) punishable as rape, above, § 1142.

1145. *Sec. 51.* "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanor," and liable to penal servitude for three (now *five*) years, or to imprisonment as above, § 1142.

1146. *Sec. 52.* "Whosoever shall be convicted of any in-

(1) *Rex v. Jackson*, Archbold, 657. But if a woman yield through fear of death, it is a rape; or if the connection take place when she is in a state of insensibility from liquor given by the prisoner (though the liquor was not given with a view to a rape) it is a rape.—*Archbold*, 656.

(2) *R. v. Weaver*. Law Reports, 2.C.C.R.83.

(3) 2 Blackstone, 212.

(4) 1 Hale, 639.

(5) The evidence in this offence, and that in the following section (§ 1145), is the same as in rape, with the exception that the act is equally punishable if done with the consent of the child. See also § 832, 834, 1146.

decent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable" to imprisonment, as above, §1142.

34 & 35 Vict.
c. 100.

1147. *Sec. 53.* "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three (now *five*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour." (6)

Abduction of
a woman
against her
will, from
motives of
lucre.

Fraudulent
abduction of
a girl under
age against
the will of
her father, &c.

1148. *Sec. 54.* "Whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment as above, § 1147.

Forcible
abduction of
any woman
with intent to
marry her.

1149. *Sec. 55.* "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor," and liable to be imprisoned as above, § 1147.

Abduction of
a girl under
sixteen years
of age.

1150. *Sec. 57.* "Whosoever, being married, shall marry Bigamy.

(6) Persons convicted of any offence against this section, are incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or which shall come to her as heiress, co-heiress, or next of kin.

24 & 25 Vict.
c. 100.

any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony," (7) and liable to penal servitude not exceeding seven years nor less than three (now *five*) years, or to imprisonment as above, § 1147.

Abortion and
attempts to
procure
abortion.

1151. *Sec. 58.* "Whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour and with or without solitary confinement.

Procuring
drugs, &c., to
cause abortion.

1152. *Sec. 59.* "Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor," and liable to penal servitude for three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour.

Concealing the
birth of a
child.

1153. *Sec. 60.* "If any woman shall be delivered of a child, every person (8) who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour. (9)

Sodomy and
bestiality, or

1154. *Sec. 61.* "Whosoever shall be convicted of the abominable crime of buggery, committed either with man-

(7) The section provides that this does not extend "to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

(8) Under former enactments, it was necessary to prove that the mother participated in the endeavour to conceal the birth, but this clause includes every person who uses such endeavour, and it is quite immaterial under it whether there be any evidence

against the mother or not.—*Gresser*, p. 57.

(9) This section further provides, if the person tried for the murder of any child shall be acquitted thereof, and it appear in evidence that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, that the court may pass such sentence as if such person had been convicted upon indictment for the concealment of the birth.

kind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than ten years.”

24 & 25 Vict.
c. 100.

1155. This crime may be committed by man with man, or in the same unnatural manner with woman, or by man or woman with beast; and the rule of law herein is, that if the parties are arrived at years of discretion, and both acting and consenting, that each shall incur the punishment due to the crime. It has been remarked of this offence, as of rape, that it is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished; but it is an offence of so black a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself. (1)

the unnatural
crimes.

1156. *Sec. 62.* “Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault, upon any male person, shall be guilty of a misdemeanor,” and liable to penal servitude not exceeding ten years, nor less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour.

Attempt to
commit an
infamous
crime.

1157. Offences against property may be considered under the heads of *Larceny* and similar offences, including *Burglary* and *Embezzlement*; *Malicious Injuries*, including *Arson*; *Forgery*; and, lastly, *Personation*. As before in respect to offences against the person, the arrangement of the several Criminal Law Consolidation Acts will be followed as to offences dealt with by them, omitting those which courts martial may be less probably called upon to try under the provisions of the articles of war.

24 & 25 Vict.
c. 96.
OFFENCES
AGAINST
PROPERTY.

1158. The act for consolidating and amending the statute law as to larceny and other similar offences, (24 & 25 Vict. c. 96) enacts (*sec. 3*), “Whosoever, being a bailee (2) of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment

Bailees frau-
dulently con-
verting pro-
perty guilty
of larceny.

(1) 4 Blackstone, 215. As to threats of accusing, *see* § 1178-9. having the property of another person in his custody.

(2) The technical name of the person

24 & 25 Vict.
c. 96.

Punishment
for simple
larceny, or
theft.

Essential
points in
the proof of
larceny.

Taking
with felonious
intent.

Questions of
felonious
intent to be
determined
according to
the evidence
in each par-
ticular matter
before the
court.

for larceny; but this section shall not extend to any offence punishable on summary conviction."

1159. *Sec. 4.* "Whosoever shall be convicted of simple (3) larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three (now *five*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

1160. To convict of larceny (*theft*) there must be proved a felonious taking (4) and carrying away of property,—either actually belonging to the person named in the indictment or charge, or in his custody as bailee,—from his possession, constructive or actual.

1161. The taking must be *felonious*, that is, done *animo furandi*, or with an intention of stealing;—without any claim or pretence of right, and with intent wholly to deprive the owner of his goods and to appropriate or convert them to the taker's own use. Otherwise the taking of another's property is a trespass only, and not an indictable offence.

1162. In deciding as to the intent, no general rules can apply, as it must be gathered from the evidence of the circumstances in each particular case. It is an admitted principle, that in every case of alleged larceny, the questions whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ fide* under a claim of right, or otherwise—and, whether he took them with an intent to return them to the owner, or fraudulently with intent to deprive the owner of them altogether, and to appropriate or convert them to his own use—are questions entirely for the consideration of the jury, (or the members of a court

(3) Compound larceny is—not repeated theft, but—stealing from the house, or person; or with other circumstances of aggravation.

The act (*sec. 5*) provides that three larcenies within six months may be tried in one indictment; and (*sec. 71*) makes a similar provision as to distinct acts of embezzlement; but this joining of several instances has always

been the rule at courts martial, and even as respects wholly dissimilar offences. *See* § 401.

(4) The thing taken must be of some intrinsic value, though it need not be of the value of the least coin known to the law, i. e. not worth a farthing.—*Reg. v. Morris, Archbold*, 297.

martial) to be determined by them, upon a view of the particular facts of the case. (5)

24 & 25 Vict.
c. 86.

1163. There are however many cases, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him, and larceny may be committed; (6) as in the case of a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like; or of the guest at an inn, who steals the plate set before him, of which he has not had the possession delivered to him, but merely the use. (7)

Larceny may
be committed
where there
has been a
delivery of
the goods.

1164. *First*.—The taking must be from another: a wife therefore cannot be guilty of larceny in taking the goods of her husband, because they are one in law. So a part owner of personal property cannot be guilty of larceny in taking it out of the possession of his co-partner, except the person in whose possession the property may be is personally responsible for it, (8) in which case a co-partner stealing property is guilty of larceny; as a man may be, who steals his own goods, for instance, from a pawnbroker, or from any person to whom he has delivered and entrusted them, with intent to charge such bailee with the value. (9)

The taking
must be
from another.

1165. *Secondly*.—It is necessary to prove a *carrying away*. The slightest removal of the chattel from the place in which it was found, will be sufficient. The prisoner had lifted a bag from the bottom of the boot of the Exeter mail, but was detected before he had got it out; it did not appear that it was entirely removed from the space it had first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that identical part had occupied; this was held by the twelve judges to be a carrying away sufficient to constitute larceny. (1)

The carrying
away.

1166. *Thirdly*.—It must be proved that the goods stolen were the property of the person set forth in the indictment or charge, either as the owner or bailee. Under this head,

Property
stolen must
be the actual
or constructive
possession of

(5) Archbold, 304.

(6) See "Larceny and Embezzlement by Servants," § 1196.

(7) 1 Hale, 806. See § 1199.

(8) Rex v. Bramley. Archbold, 305.

(9) 4 Blackstone, 231. If a man steal his own goods from his own bailee, though he has no intent to

charge such bailee, but to defraud the customs of certain duties payable thereon, yet if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is larceny.—Rex v. Wilkinson, Archbold, 404.

(1) Rex v. Walsh, Roscoe, 605.

24 & 25 Vict.
c. 96.
the party
specified in
the charge.

there are many refinements of law, which can scarcely be the subject of consideration by courts martial; (2) the principal of which are, that when the bailor steals his own goods, they should be charged as the goods of the bailee. (3)

Stealing
horses, cows,
sheep, &c.

Killing animals
with intent
to steal the
carcase, &c.

1167. The 24 & 25 Vict. c. 96, [§ 1158] enacts (*sec. 10*), "Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony," and liable to penal servitude for fourteen years nor less than three (now *five*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement. (*Sec. 11*.) "Whosoever shall wilfully kill (4) any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony."

Wills or
codicils.

1168. *Sec. 29*. "Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony," and liable to penal servitude for life or for not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement. (5)

Robbery or
stealing from
the person.

1169. As to larceny from the person, and other like offences, by *sec. 40*, "Whosoever shall rob (5) any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony," and liable to penal servitude for fourteen years and not less than three years, or to imprisonment as above [§ 1168].

The offence
may be found
whether the

1170. Larceny from the person by open and violent assault, (6) falls under the description of robbery, but should

(2) See before, § 391-3. As to power of court to amend variances, see § 846-8.

(3) *R. v. Wilkinson and Marsden*, Archbold, 298.

(4) Compare § 1219.

(5) This section also provides that other remedies at law or in equity are not to be affected.

(6) See definition of "Assault," § 1139.

the prisoner be charged with stealing from the person, and it appear in evidence that he is actually guilty of robbery, he is not on that account entitled to an acquittal [§ 831].

24 & 25 Vict.
c. 96.
theft effected
by stealth or
violence.

1171. *Robbery* is the felonious and *forcible taking* of any property from the person of another, or in his presence, against his will. It will be observed that this offence differs from simple larceny inasmuch as the taking must be forcible (7) and from larceny from the person, as it may be committed by taking from another *in his presence* only, as where a robber by menaces or violence puts a man in fear and drives away his cattle before his face. (8)

Robbery,
definition of.

The taking
must be
forcible;

1172. To maintain this charge, the force proved may be either actual, or constructive by putting in fear. With respect to the former it is not necessary that there should be an actual injury to the person: it is sufficient to show that there was a struggle, or that the property was wrested from the person by some considerable degree of violence, as where the prisoner laid violent hold of the prosecutor's watch, which was secured by a steel chain round his neck, and, by two or three jerks, broke the chain and made off with the watch; it was held unanimously by the judges, that the degree of violence here employed was sufficient to justify a conviction of robbery, because the prisoner could not obtain the watch at once, but had to overcome the resistance of the steel chain by actual force. (9) The crime may equally be committed by putting in fear (either by threats (1) or gestures) to such a degree as might create an apprehension of danger in a mind of ordinary firmness, sufficient to induce a surrender of property to him who had no pretence of claim to it; and in this case, if the circumstances thus proved be such as are calculated to create such a fear, it is not necessary to pursue the inquiry further, and examine whether the fear actually existed. (2)

by actual
violence;

or by putting
in fear.

1173. *Sec. 41.* "If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the

On trial for
robbery, a
court martial

(7) The taking must be complete; otherwise it is no robbery, but assaulting with intent to rob, or demanding property by menaces; as to which offences, see § 1173-77.

(8) 1 Hale, 533.

(9) *R. v. George Mason, R. & R.* 419, cited Archbold, 381-2.

(1) Obtaining money by threatening a charge for an infamous crime, had been holden to be robbery, even where the prosecutor parted with his money from a fear merely of losing his character, but this offence is now expressly declared felony.—See § 1178.

(2) Foster, 128-129.

24 & 25 Vict.
c. 86.

may convict
of an assault
with intent
to rob.

Assault with
intent to rob.

Robbery or
assault by a
person armed,
or by two or
more, or
robbery and
wounding.

Letter,
demanding
money, &c.,
with menaces.

Demanding
money, &c.,
with menaces, or
by force, with in-
tent to extort.

evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

1174. *Sec. 42.* "Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this act) be liable" to penal servitude for three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour and with or without solitary confinement.

1175. *Sec. 43.* "Whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony," and liable to penal servitude for life, or not less than three (now *five*) years, or to imprisonment as above, §1174; and to the additional punishment of whipping as above, §1132.

1176. *Sec. 44.* "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment as above, §1174.

1177. *Sec. 45.* "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to

steal the same, shall be guilty of felony," and liable to penal servitude for three (now *five*) years, or to imprisonment as above, § 1174. 24 & 25 Vict.
c. 96.

1178. *Sec. 46.* "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter (3) defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony," and liable to penal servitude for life, or not less than three (now *five*) years, or to imprisonment as above, § 1174. Threatening
letters.

1179. *Sec. 47.* "Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment as above, § 1174. Accusing or
threatening to
accuse, with in-
tent to extort ;

1180. *Sec. 49.* "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person." immaterial
who is named
as the agent
from whom
the menaces
proceed.

1181. *Sec. 50.* "Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting-house, or other place of divine worship, shall commit any felony therein and break out of the same, shall SACRILEGE.
Breaking and
entering a
church or
chapel and
committing
any felony.

(3) "The abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, pro-
mise, or threat, offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act."—*Sec. 46.*

24 & 25 Vict.
c. 96.

be guilty of felony and liable to penal servitude for life, or not less than three (now *five*) years, or to imprisonment as above, § 1174.

BURGLARY
no longer a
capital offence,

1182. *Sec. 52.* "Whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three (now *five*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and solitary confinement."

breaking and
entering by
night.

1183. BURGLARY at common law is defined "a breaking and entering by *night* the dwelling-house of *another*, with *intent* to commit a felony within the same, whether the felonious intent be executed or not:" (4) and here it is to be observed, that breaking without entering, and entering without breaking, (5) is not burglary. But by the 24 & 25 Vict. c. 96, s. 51, "Whosoever shall enter the dwelling-house of another with intent (6) to commit felony therein, or being in such dwelling-house, shall commit felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

Burglary;
entering with
intent to com-
mit felony.
and breaking
out at night;
or actually
committing
felony, and
breaking out
at night.

Definition of
night for the
purposes of
the act
24 & 25 Vict.
c. 96.

1184. Many questions formerly arose as to the meaning of *night time*, but the 24 & 25 Vict. c. 96, s. 1, enacts, "For the purposes of this act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

An actual
breaking

is complete,
however
slight.

1185. The slightest removal of a bar or bolt; or lifting up a latch, or unloosing any other fastening which the owner has provided; as opening a window on its hinges, fastened by a wedge; (7) or the lowering a sash window, kept in its place only by the weight, though the shutters attached to the window be not fastened; (8) the entering of a chimney; (9) or by taking out the glass of a door; (1) are held to be

(4) 1 Hawkins, 152.

(5) As to entering in the night, see § 1189; as to housebreaking, see § 1192.

(6) "The *intent* to commit felony must be made appear, by the admission of the prisoner, or by attendant circumstances, of which the jury or the court martial will judge. The actual commission of felony after the entry of a house, is the best evidence of the intention: and the bare fact of

a man's breaking into a house in the night time, is evidence of the intent to steal, sufficiently strong to warrant conviction, unless a contrary intention be proved."—*R. v. Brice*, Russell & Ryan, 450.

(7) *R. v. Hull*, *ib.* 355.

(8) *R. v. Haines and Harrison*, *ib.* 457.

(9) 1 Hawkins, 160.

(1) *R. v. Smith, Russell & Ryan*, 417.

breaking sufficient to constitute burglary: so also to knock at a door, and, upon its being opened, to rush in with a felonious intent; (2) or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search the house, and then to bind the constable and rob the inhabitants, have been adjudged burglarious; (3) though there has been no actual breaking: but opening the lock of an area door by a skeleton key, and passing into the dwelling-house by an open door; (4) pushing a window wide open which had been left a little open, and thereby gaining an entrance; (5) entering by an open cellar window; (6) are not acts, which amount to a burglarious breaking and entering; although they are felonies under the provisions of the law, hereafter [§ 1189-93] quoted. If a servant conspire with a robber, and let him into the house, it is burglary in both: so, if some stand back to watch, whilst others enter and rob, they are guilty of burglary; for in all such cases, the act of one is, in judgment of law, the act of all. (7)

24 & 25 Vict.
c. 96.

Constructive
breaking by
some artifice
or trick.

Cases of
entering
adjudged not
to be breaking.

1186. A burglary may be committed by *breaking on the inside*; for though a thief enter a dwelling-house in the night time by an outside door left open, or by an open window, yet if, when in the house, he turn a key or unlatch a chamber door with intent to commit felony, it is burglary: (8) and this holds good of a servant, or of a person lodging (or quartered) in the same house, or in a public inn, who opens and enters another's door with evil intent. (9) A servant lay in one part of the house and his master in another; between them was a door at the foot of the stairs, which was latched; the servant in the night drew the latch and entered his master's chamber in order to murder him; this was held to be burglary, (1) as was also the case of a servant, who opened his lady's chamber door, which was fastened with a brass bolt, with design to commit a rape. (2)

Breaking on
the inside;

by an inmate,
servants, or
guest.

1187. It must be a mansion or dwelling-house, that is to say, any permanent building in which the occupier or any

What is deemed
a mansion or
dwelling-house.

(2) 1 Hawkins, 161.

(3) *Ib.*

(4) R. v. Davis, Russell & Ryan,
332.

(5) Rex v. Smith. 1 Mood., C.C.
178.

(6) Rex v. Lewis, 2 C. & P. 628.

(7) 1 Hawkins, 162.

(8) 2 East, 488.

(9) 1 Hale, 553, 554.

(1) 2 East, 488.

(2) 1 Strange, 481.

24 & 25 Vict.
c. 96.

part of his family usually *sleep* at night. (3) An occupation by day, the occupier taking his meals therein, but sleeping in another house, does not constitute a dwelling-house; but if a part of his family or domestic servants sleep and have their meals in it, it will be sufficient, though the prosecutor may have removed to another house, without intention of returning; but not when the persons were employed in a trade, and had not their meals in the house, though sleeping in it. Chambers in an inn of court, or rooms in a college, are deemed a distinct dwelling-house for this purpose, (4) and it is probable that the same would apply in the case of an officer's quarter in a barrack. (5)

What buildings
are deemed part
of the dwelling-
house.

1188. The term dwelling-house, in its legal signification, includes all out-houses occupied, and communicating immediately with the dwelling-house; but by the present act (*sec.* 53), "No building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

Entering a
dwelling-house
in the night
with intent to
commit any
felony.

1189. *Sec.* 54. "Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony," and liable to penal servitude not exceeding seven years nor less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement. (6)

Breaking into
any building
within the
curtilage which
is no part of the

1190. *Sec.* 55. "Whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied

(3) The mere temporary absence of the owner and his family will not deprive the house of the protection the law gives it, as if a man have a town and country house, and while he is in the country, his town house be broken open: (1 *Hale*, 566), or if a man lock up his house and go on a journey, and during his absence it is broken and entered.—*R. v. Murray*, 2 East, 496.

(4) 1 Hawkins, 163. 1 Hale, 566.

(5) Any technical variance in the charge in this point is of the less consequence, as it may be remedied by a

special finding.—§ 851-4.

(6) This is a new clause, and meets the case where there is not sufficient proof that the house has been broken into, but there is no moral doubt that it had been so: and also cases where any door or window has been left open, and the prisoner has entered by it in the night. Upon a trial for burglary, with intent to commit a felony, if the proof of the breaking should fail, the prisoner may nevertheless be convicted of the offence, created by this clause.—*Greaves*, 107.

therewith, but not being part thereof, according to the provision hereinbefore mentioned," "or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment, as above, § 1189.

24 & 25 Vict.
c. 96.

1191. *Sec. 56.* "Whosoever shall break and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment, as above, § 1189.

dwelling-house
and committing
any felony.

1192. *Sec. 57.* "Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony," (7) and liable to penal servitude not exceeding seven years nor less than three (now *five*) years, or to imprisonment, as above, § 1189.

Housebreaking,
&c., with intent
to commit any
felony.

1193. *Sec. 58.* "Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor," and liable to penal servitude for three (now *five*) years, or imprisonment not exceeding two years, with or without hard labour. (8)

Being armed
with intent to
break and enter
any house in
the night.

Or having house-
breaking tools,

or being
disguised.

(7) This is also a new clause, and remedies an inconsistency in the former law, by which an act done after nine o'clock was a felony punishable by transportation, and the same act done just before nine only a misdemeanor. On a trial for burglary, if it

should appear the breaking and entry were before nine o'clock, the prisoner might be punished under this clause.—*Greaves*, 110; and see § 1189.

(8) The like, after a previous conviction for felony, punishable by ten years' penal servitude.—*Sec. 59.*

24 & 25 Vict.
c. 96.

Stealing in a
dwelling-house
to the value
of £1.

1194. *Sec. 60.* "Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Stealing in a
dwelling-house
with menace.

1195. *Sec. 61.* "Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment not exceeding two years with or without hard labour, and with or without solitary confinement.

WRECKING.
Stealing from
ship in distress
or wrecked.

1196. *Sec. 64.* "Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment as above, § 1195.

1197. The act also provides as to larceny or embezzlement (9) by clerks, servants, or persons in the public service

(9) EMBEZZLEMENT is when a person fraudulently converts to his own use property which he has had authority to receive, or take possession of, for another; for which reason there could not in this case be a *taking* of the property to constitute larceny, nor could the offender commit a felony in respect to it, at common law, which gave the injured party his remedy by civil process.

It was formerly held, that upon an indictment for larceny, if an embezzlement were proved, the prisoner must be acquitted, and *vice versâ*. The distinctions between these offences were so very fine drawn, that until the facts were disclosed on the trial, it was difficult, even for lawyers by profession, to know under which head a particular offence would come; and although, in the criminal courts of this country it was customary to indict a prisoner for larceny and embezzlement in separate courts, failures of justice were the not unfrequent result of these subtleties. This defect

of the law was remedied by Lord Campbell's act for improving the administration of criminal justice, which became law in 1851, and this clause, as it now stands in the present act, (*sec. 72*), provides upon the trial of any person indicted for embezzlement, fraudulent application or disposal of chattels, money, &c., as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, or persons in the Queen's service, or in the police, if it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted; but may be found guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant as the case may be; and *vice versâ*, if tried for larceny. *Sec. 88* makes a similar provision as to obtaining money, &c., by false pretences.—*See* § 1200.

(*sec. 67*), "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three (now *five*) years, or to imprisonment as above, § 1195.

24 & 25 Vict.
c. 96.
Larceny by
clerks or
servants,
or persons
occasionally
employed
as such.

1198. *Sec. 68.* "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable," (1) to penal servitude not exceeding fourteen years nor less than three (now *five*), years or to imprisonment as above, § 1195.

Embezzlement
by clerks or
servants.

Of property in
the constructive
possession of
employers.

1199. *Sec. 74.* "Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony," and liable to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, "and in case the value of such chattel or fixture shall exceed the sum of five pounds," shall be further liable to penal servitude for seven and not less than three (now *five*) years, or imprisonment, as above, § 1195.

LARCENY BY
TENANTS OR
LODGERS.

Tenant or lodger
stealing chattel
or fixture let to
hire with house
or lodgings,

if above the
value of 5*l.*

1200. *Sec. 88.* "Whosoever shall by any false pretences (2)

CHEATING.

(1) Sections 69 and 70 make similar provisions as to embezzlement and larceny by persons in the Queen's service, or by the police. See also § 205.

(2) The 8 & 9 Vict. c. 190, s. 17, enacts, "That every person who shall by any fraud or unlawful device or ill practice, in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or

adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself or any other, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing by a false pretence, with intent to cheat or defraud, and being convicted thereof, shall be punished accordingly."

24 & 25 Vict.
c. 36.

Obtaining
money, &c., by
false pretences,
a misdemeanor.

No acquittal be-
cause the offence
amounts to
larceny.

Receivers of
stolen property,

when the
original offence
was felony ;

how triable,

how punished.

Receivers,
where the
original offence is
a misdemeanor.

obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three (now *five*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement: provided, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." (3)

1201. As to receivers of stolen goods, (4) it is enacted, by *sec. 91*, "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a *substantive* felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and every such receiver, howsoever convicted, shall be liable" to penal servitude not exceeding fourteen years nor less than seven years, or to imprisonment not exceeding two years, with or without hard labour or solitary confinement. And by *sec. 95*, "Whosoever shall receive any chattel, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted shall be guilty of a misdemeanor,"

(3) This section also provides that it is not necessary to prove an intent to defraud any particular person, but merely that the party accused did the act charged with an intent to defraud. *Sec. 89*, that the cheat is equally punishable if the money or thing be paid or delivered to any person other than

the person making a false pretence.

(4) It is more common, in cases where it might be supposed that the court would not award penal servitude for the civil offence, to try military offenders for disgraceful conduct, under the ordinary provisions of the mutiny act and articles of war.

triable as in the former case (§1201), and liable on conviction to penal servitude for seven or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

24 & 25 Vict.
c. 96.

1202. The act also provides that (*sec. 92*), In any indictment containing a charge of feloniously stealing any property (such as burglary, housebreaking, &c.) a count or counts for feloniously receiving the same knowing the same to have been stolen, may be added, and *vice versa* in any indictment for feloniously receiving any property; and the jury may find a verdict of guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen. If two or more persons (5) are tried together, all or any may be found guilty either of stealing the property or of receiving the same, or any part thereof, or one or more may be found guilty of stealing, and the other or others may be found guilty of receiving.

The charges
may be
alternative,

but finding must
be precise.

1203. The statute law relating to malicious injuries to property was consolidated and amended by the 24 & 25 Vict. c. 97. The wilful and malicious burning of the house of *another* is a felony at common law; modern statutes have specified the burning of the offender's own house and numerous cases of arson which were not otherwise provided for. This felony is no longer capital in any case.

24 & 25 Vict.
c. 97.

ARSON:
at common law,

extended by
statute.

1204. The absence of malice or spite to the owner is no defence in this or any other case of malicious injury to property, (6) nor need the intent to injure any particular person be stated in the charge. (7) As a general rule, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved; but in the case of a man burning his own property (§1203), the intent to injure or defraud must be proved from other circumstances.

Malice,

how proved.

1205. The intent or an attempt to burn is not sufficient; the words of the statute are "*set fire to*," and therefore the offence is not complete without an actual setting on fire to the building, or other property specified in the statute, however trifling it may be, or however soon extinguished.

The setting on
fire.

(5) By *sec. 93*, separate receivers may be tried together in the absence of the principal.

(6) 24 & 25 Vict. c. 97, s. 58. As to the legal use of "Malice," *see* §1118.

(7) 24 & 25 Vict. c. 97, s. 60,

24 & 25 Vict.
c. 97.
but attempts
are punishable
according to the
nature of the
designed offence.

1206. In those cases where the offence, if complete, would have been felony, the attempt (provided there is proof of some *overt act*) is declared felony,—in the case of buildings or goods in buildings (*sec.* 1-7) punishable (*sec.* 8) by fourteen years' penal servitude,—and in cases of crops or stacks (*sec.* 16, 17) punishable (*sec.* 18) by seven years' penal servitude. Where the complete offence does not amount to felony the attempt is merely a misdemeanor.

Statutes relating to arson and other malicious injuries to property.

1207. The other offences, which are punishable under the act relating to malicious injuries to property, (8) and which it may be useful to recapitulate, do not appear to call for any observation, and will be best described in the words of the statute.

Setting fire to a church or chapel.

1208. *Sec.* 1. "Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony," and be liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Setting fire to a dwelling-house, any person being therein.

1209. *Sec.* 2. "Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment as above, § 1208.

Setting fire to a house, outhouse, manufactory, farm building, &c.

1210. *Sec.* 3. "Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn storehouse, granary, hovel, shed, or fold, or any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment as above, § 1028.

(8) Except in cases calling for the condign punishment provided by statute, malicious injuries to property are punishable, under the 103rd article—in the case of officers, by cashiering or other punishment, and in the case of soldiers, by a regimental court mar-

tial. In addition to any other punishment a court martial may award, the court may direct any offender to be put under stoppages, until he has made good the destruction, damage, or injury of any property whatsoever. —A. W. 130.

1211. *Sec. 4.* "Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbour, or to any canal or other navigation, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour.

24 & 25 Vict.
c. 97.
Setting fire to
any railway
station,
warehouse,
engine-house,
&c.

1212. *Sec. 5.* "Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour.

Setting fire to
any public
building.

1213. *Sec. 6.* "Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, shall be guilty of felony," and liable to penal servitude for fourteen years or not less than three (now *five*) years, or imprisonment not exceeding two years, with or without hard labour.

Setting fire to
other buildings.

1214. *Sec. 7.* "Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony," and liable to penal servitude not exceeding fourteen nor less than three (now *five*) years, or imprisonment not exceeding two years, with or without hard labour. (9)

Setting fire to
goods in any
building the
setting fire to
which is felony.

1215. *Sec. 8.* "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endan-

Destroying or
damaging a
house with
gunpowder, any
person being
therein.

(9) By *sec. 16*, setting fire to crops of hay, corn, &c., whether standing or cut down, or to any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, is a felony, punishable by fourteen years' penal servitude; and by *sec. 17*, setting fire to any stack of corn, hay, straw, furze, turf, coals, wood, bark, &c., is a felony, punishable by penal servitude for life.

24 & 25 Vict.
c. 97.

gered, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour and with or without solitary confinement.

Attempting to
destroy
buildings with
gunpowder.

1216. *Sec. 10.* "Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, *whether or not any explosion take place*, and whether or not any damage be caused, be guilty of felony," (1) liable to penal servitude not exceeding fourteen nor less than three (now *five*) years, or to imprisonment, as above, §1215.

Rioters de-
molishing
church, house,
building, &c.

1217. *Sec. 11.* "If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used

Rioters destroy-
ing machinery,
&c.

(1) By *sec. 33*, "unlawfully and maliciously pulling or throwing down or in anywise destroying any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct any highway, railway, or canal shall pass, or doing any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway,

railway, or canal passing over or under the same, or any part thereof, dangerous or impassable," is a felony, punishable by penal servitude for life.

The act in other sections provides for the punishment of malicious injuries to railways, electric telegraphs, works of art, &c.

As to obstructions on railways, *see* § 1137(3).

in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals, from any mine, every such offender shall be guilty of felony," (2) liable to penal servitude for life or not less than three (now *five*) years, or to imprisonment, as above, § 1215.

24 & 25 Vict.
c. 97.

1218. *Sec. 12.* "If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and liable to penal servitude not exceeding seven years nor less than three (now *five*) years, or imprisonment not exceeding two years, with or without hard labour. (3)

Rioters
injuring
building,
machinery, &c.

1219. *Sec. 40.* "Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony," liable to penal servitude not exceeding fourteen nor less than three (now *five*) years, or to imprisonment not exceeding two years, with or without hard labour and with or without solitary confinement. (4)

Killing or maim-
ing cattle.

1220. *Sec. 50.* "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony," liable to penal servitude for ten years or not less than three (now *five*) years, or to imprisonment, as above, § 1219.

Sending letters
threatening to
burn or destroy
buildings, farm-
produce, or to
injure cattle.

1221. FORGERY is the false making, altering, or adding to any writing or document to the prejudice of another's right. It is a misdemeanor at common law, and has been declared

Forgery
defined;

(2) Upon the trial of any person for any felony under this section, if the jury or court martial are not satisfied that such person is guilty thereof, but find that he is guilty of any offence in sec. 12 (§ 1218), he may be punished

accordingly.

(3) This section does not specify solitary confinement.

(4) The 102nd article of war applies only to a soldier *ill-treating* his horse.

24 & 25 Vict.
c. 97.
no longer
capital.
Evidence of
a general intent
to defraud
is sufficient.

felony by statute in a great variety of cases, but is no longer capital in any instance. It is not intended to enter at all into detail upon the subject of forgery. To establish the offence, whether at common law or by statute, it is necessary to prove that the *false making* or the *altering* or *adding to the genuine instrument* was with an *intention* to defraud, (5) but it is not necessary to prove the publication of the instrument by which the fraud was purposed to be effected, nor that any injury has been sustained, nor is it any longer necessary to allege or prove an intention to defraud any particular person. (6)

24 & 25 Vict.
c. 98.
Forgeries,
by statute.

Forging, utter-
ing, or putting
off bank notes,
&c.,

felony.

1222. The forgeries which are at all likely to become the subject of investigation by courts martial, will be found in the following clauses of the 24 & 25 Vict. c. 98, consolidating and amending the statute law "relating to indictable offences by forgery." (Sec. 12.) "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or imprisonment not exceeding two years with or without hard labour and with or without solitary confinement.

Forging wills.

1223. The following offences are also declared felonies and rendered liable to the same punishment. (Sec. 21.) "Whosoever, with intent to defraud, forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument;" (sec. 22) "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same

Forging or
uttering forged
bills of ex-

(5) Where the intention is merely to *deceive*, the offence does not come within the definition of forgery. This observation might seem superfluous, except that this mistake has been made subject of remark by the highest authority. Producing forged passes

to non-commissioned officers or others on duty at gates or sally-ports, and similar acts of misconduct, are military offences punishable under the 105th article of war.

(6) 24 & 25 Vict. c. 98, s. 44.

to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of any such promissory note, with intent to defraud."

24 & 25 Vict.
c. 96.
change or
promissory
notes.

1224. *Sec. 24.* "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent in any of the cases aforesaid to defraud, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or imprisonment, as above, § 1222.

Forging orders,
receipts, &c.,
for money,
goods, &c.

1225. *Sec. 25.* "Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony," and liable to penal servitude for life or not less than three (now *five*) years, or imprisonment, as above, § 1222.

Obliterating
crossings on
cheques.

1226-49. The Tichborne trial having drawn attention to the law, it has been enacted by the "False Personation Act, 1874": (*Sec. 1*) "If any person shall falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next-of-kin, or any relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony," and liable to penal servitude for life, or not less than five years, or imprisonment, as above § 1222.

37 & 38 Vict.
c. 36.

Personation in
order to obtain
property.

APPENDIX.

No. I.

Form of Warrant under the Sign Manual, empowering General Officers in command at home to assemble General Courts Martial.

(SIGN MANUAL.)

1250. IN pursuance of the provisions of the Mutiny Act, and of Our Articles of War, hereunto annexed,—We hereby authorize you from time to time, as occasion may require, to convene *General Courts Martial* for the trial of any Officer or Soldier of our Forces under your Command, who shall be charged with any Offence against Military Discipline, whether such Offence shall have been committed before or after you shall have taken upon yourself your Command. The said Courts Martial shall be constituted, and shall proceed in the trial of the Offenders, and in giving sentence and in awarding punishment, according to the powers and directions contained in the said Mutiny Act and Articles of War.
1251. We are further pleased to order that the proceedings of every such Court Martial shall be transmitted to Our Judge Advocate General, in order that he may lay the same before Us for Our Consideration, and afterwards send them to Our Field Marshal Commanding in Chief, or, in his absence, to the Adjutant General of our Forces, for Our decision thereupon. And for so doing, this shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

Given at our Court at ———, this ——— day of ———,
187—, in the ——— year of Our Reign.

By Her Majesty's Command.

(Signature of Secretary of State.)

To
The General
or Officer Commanding

No. II.

Form of Warrant under the Sign Manual, enabling Officers in command abroad to assemble General and District Courts Martial, &c.

1252.

(SIGN MANUAL.)

IN pursuance of the Provisions of the Mutiny Act and of Our Articles of War hereunto annexed,—We do hereby authorize you from time to time, as occasion may require, to convene Courts Martial for the trial of any Officer or Soldier of Our Forces under your Command, who shall be charged with any offence against Military Discipline, whether such Offence shall have been committed before or after you shall have taken upon yourself your Command.

And we hereby further authorize you to confirm the Proceedings of any such Courts Martial, and to cause any sentence thereof to be put in execution, or to suspend, mitigate, remit, or commute such sentence in accordance with the said Mutiny Act and Articles of War.

And we do hereby further authorize you to direct your Warrant to any Officer (not under the rank of a Field Officer) having the Command of a body of Our said Forces authorizing him to convene Courts Martial for the trial of any offence against Military Discipline committed by any Officer or Soldier under his Command, whether such offence shall have been committed before or after such Officer shall have taken upon him his Command, and also authorizing him to exercise in respect of the proceedings of such Courts Martial all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War; or if you should so think fit, directing him to refer the proceedings of all or any such Courts Martial to you, in which case you are hereby authorized to exercise in respect of the proceedings so referred all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War.

1253.

Provided always, that if by the sentence of any General Court Martial a Commissioned Officer has been sentenced to suffer Death, Penal Servitude, or to be cashiered, or dismissed (1) from Our Service, you shall in such case as also in the case of any other General Court Martial in which you shall think fit so to

1254.

(1) The disused form of warrant here inserted, "or discharged."

do, transmit the proceedings to Our Judge Advocate General, in order that he may lay the same before Us, and afterwards send them to Our Field Marshal Commanding in Chief, or, in his absence, to the Adjutant General of Our Forces, for Our decision thereupon.

1255. And that there may not in any case be a failure of justice from the want of a proper person authorized to act as Judge Advocate, We do hereby further empower you, in default of a person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the illness or occasional absence of the person so appointed or deputed, to nominate and appoint, and to delegate to any Officer duly authorized to convene a General Court Martial the power of appointing a fit person from time to time for executing the Office of Judge Advocate of any Court Martial for the more orderly proceedings of the same. And for enforcing the sentence of any such Court Martial We do also give you authority to appoint and to delegate to any Officer duly authorized to convene a General Court Martial the power of appointing a Provost Marshal to use and exercise that Office as it is usually practised in the Law Martial. And for executing the several powers, matters, and things herein expressed, these shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

[§759(4)]

Given at Our Court at St. James', this — day of —, 187—, in the — year of Our Reign.

By Her Majesty's Command.

(*Signature of Secretary of State.*)

To

The General
or Officer Commanding the Forces.

No. III.

Form of Warrant under the Sign Manual empowering the Commander in Chief in the East Indies to assemble General and other Courts Martial, &c.

(SIGN MANUAL.)

1256. In pursuance of the provisions of the Mutiny Act and of Our Articles of War hereunto annexed,

We do hereby authorize you from time to time, as occasion may require, to convene Courts Martial for the Trial of any Officer or Soldier (2) under your Command, who shall be charged with any offence against Military Discipline, whether such offence shall have been committed before or after you shall have taken upon yourself your Command.

And We hereby further authorize you to confirm the proceedings of any such Courts Martial, and to cause any sentence thereof to be put in execution, or to suspend, mitigate, remit, or commute such sentence in accordance with the said Mutiny Act and Articles of War.

And We do hereby further authorize you to direct your Warrant to any Officer not under the rank of a Field Officer having the Command of a body of Our said (3) Forces, authorizing him to convene Courts Martial for the trial of any offence against Military Discipline, committed by any Officer or Soldier under his Command, whether such offence shall have been committed before or after such Officer shall have taken upon him his Command, and also authorizing him to exercise in respect of the proceedings of such Courts Martial all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War; or, if you should so think fit, directing him to refer the proceedings of all or any such Courts Martial to you, in which case you are hereby authorized to exercise in respect of the proceedings so referred all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War.

1257-

And you are also hereby authorized to exercise the like powers of a confirming Officer in respect of the proceedings of any General Court Martial referred to you by Our General or other Officer Commanding Our Forces in the Presidency of Bengal, Madras, and Bombay.

1258.

We also hereby authorize you, in any case in which you shall think fit so to do, to transmit the proceedings of any General Court Martial to Our Judge Advocate General, in order that he may lay the same before Us, and afterwards send them to Our Field Marshal Commanding in Chief, or, in his absence, to the Adjutant General of Our Forces, for Our decision thereupon.

1259.

We also hereby further authorize you to appoint from time to time as occasion may require, Courts Martial for the trial of

1260.

(2) The words "*of our forces*," followed in this place in the disused form of warrant.

(3) The word "*said*" has been retained, possibly from inadvertence, as it refers to the words "*of our forces*," which have been omitted, as mentioned in the last note.

crimes as provided for by the 101st Section of the Mutiny Act, 1868, whether such crimes shall have been committed before or after you shall have taken upon yourself your Command; and We hereby further authorize you to confirm the proceedings of any such Court Martial, and to cause any sentence thereof, to be put in execution, or to suspend, mitigate, remit, or commute such sentence, in accordance with the provisions of the said Section of the said Act.

1261. And that there may not, in any case, be a failure of justice from the want of a proper person authorized to act as Judge Advocate, We do hereby further empower you, in default of a person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the illness or occasional absence of the person so appointed or deputed, to nominate and appoint (4) and to delegate to any Officer duly authorized to convene a General Court Martial the power of appointing a fit person from time to time for executing the Office of Judge Advocate at any Court Martial for the more orderly proceedings of the same.

1262. And for enforcing the Sentence of every such Court Martial, We do also give you authority to appoint and to delegate to any Officer duly authorized to convene a General Court Martial the power of appointing a Provost Marshal to use and exercise that Office as it is usually practised in the Law Martial.

And for executing the several powers, matters, and things herein expressed, these shall be to you and all others whom it may concern a sufficient Warrant and Authority.

Given at Our Court at ———, this ——— day of ———,
18—, in the ——— year of Our Reign.

By Her Majesty's Command.

(Signature of Secretary of State.)

The General or Officer

Commanding in Chief

The Forces in the East Indies.

(4) The words here used have been held not to invalidate the appointment of an officiating judge advocate in the army in India by a mere notification in orders instead of by the customary general or special warrant. The "Form of Recording the Proceedings" in the Queen's Regulations (Q.R. App. B. (1.), by specifying the reading of the warrant appointing the deputy or officiating judge advocate, does not appear to countenance any deviation from the established custom of the service.

No. IV.

Warrant under Sign Manual empowering the Officer Commanding the Forces in the Presidencies to convene Courts Martial, &c.

(SIGN MANUAL.):

IN pursuance of the provisions of the Mutiny Act and of Our Articles of War hereunto annexed,

1263.

We do hereby authorize you from time to time, as occasion may require, to convene Courts Martial for the Trial of any Officer or Soldier under your Command, who shall be charged with any offence against Military Discipline, whether such offence shall have been committed before or after you shall have taken upon yourself your Command.

And We hereby further authorize you to confirm the proceedings of any such Courts Martial, and to cause any sentence thereof to be put in execution, or to suspend, mitigate, remit, or commute such sentence in accordance with the said Mutiny Act and Articles of War.

And We do hereby further authorize you to direct your Warrant to any Officer not under the rank of a Field Officer having the Command of a body of Our said Forces authorizing him to convene Courts Martial for the trial of any offence against Military Discipline committed by any Officer or Soldier under his Command, whether such offence shall have been committed before or after such Officer shall have taken upon him his Command; and also authorizing him to exercise, in respect of the proceedings of such Courts Martial, all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War; or if you should so think fit, directing him to refer the proceedings of all or any such Courts Martial to you; in which case you are hereby authorized to exercise in respect of the proceedings so referred, all the powers of a confirming Officer in accordance with the said Act and Articles of War.

1264.

Provided always that if by the sentence of any Court Martial any Commissioned Officer either of Our Army or of Our Indian Forces has been sentenced to suffer Death, Penal Servitude, or to be cashiered or dismissed from Our Service, you shall in such case, as in any other in which you shall think fit so to do, refer the proceedings to the General Commanding in Chief Our Forces in the East Indies, for him to act in respect thereof as he shall think right.

We also hereby further authorize you to appoint from time to

1265

time, as occasion may require, Courts Martial for the trial of crimes as provided for by the 101st Section of the Mutiny Act, 1868, whether such crimes shall have been committed before or after you shall have taken upon yourself your Command; and We hereby further authorize you to confirm the proceedings of any such Court Martial, and to cause any sentence thereof to be put in execution, or to suspend, mitigate, remit, or commute such sentence in accordance with the provisions of the said Section of the said Act.

1266. And that there may not in any case be a failure of justice from the want of a proper person authorized to act as Judge Advocate, We do hereby further empower you, in default of a person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the illness or occasional absence of the person so appointed or deputed, to nominate and appoint, and to delegate to any Officer duly authorized to convene a General Court Martial, the power of appointing a fit person from time to time for executing the Office of Judge Advocate at any Court Martial for the more orderly proceedings of the same.

[§1266(4)]

1267. And for enforcing the sentence of any such Court Martial, We do also give you authority to appoint and to delegate to any Officer duly authorized to convene a General Court Martial, the power of appointing a Provost Martial to use and exercise that Office as it is usually practised in the Law Martial.

And for executing the several powers, matters, and things herein expressed, these shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

Given at Our Court at ———, this ——— day of ———,
18—, in the ——— year of Our Reign.

By Her Majesty's Command.

(Signature of Secretary of State.)

To

The General
or Officer Commanding the Forces
(Bengal, Madras, Bombay).

No. V.

Form of Warrant under the Sign Manual enabling Officers in Command to assemble District or Garrison Courts Martial, &c.

(SIGN MANUAL.)

In pursuance of the provisions of the Mutiny Act and of Our Articles of War hereunto annexed, We hereby authorize you, from time to time as occasion may require, to convene District and Garrison Courts Martial, for the trial of any Soldier belonging to Our Forces under your Command, who shall be charged with any offence against Military Discipline, whether such offence shall have been committed before or after you shall have taken upon yourself your Command. We hereby further authorize you to direct your Warrant to any Officer, not under the degree of a Field Officer, having the Command of a body of Our Forces (not less than four Troops or Companies), authorizing him to convene from time to time such Courts Martial as occasion may require, for the trial of any Soldier under his Command. The said District and Garrison Courts Martial shall be constituted and shall proceed in the trial of the offenders, and in giving sentence and awarding punishment (not extending to death or to penal servitude), according to the powers and directions contained in the said Mutiny Act and Articles of War.

.1268.

And We do hereby authorize you, and in your absence the Officer on whom your Command may devolve, to confirm the proceedings of any such Courts Martial, and to cause any sentence thereof to be put in execution, or to suspend, mitigate, or remit such sentence, as shall be best for the good of Our Service.

1269.

And for so doing this shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

1270.

Given at Our Court at ———, this ——— day of ———,
18—, in the ——— year of Our Reign.

By Her Majesty's Command.

(Signature of Secretary of State.)

To

The General or
Officer Commanding the Forces.

No. VI.

Form of Warrant by a Commander of the Forces (abroad) to a Superior or Field Officer authorizing him to convene Courts Martial.

1271. By His Excellency the General (or Officer) Commanding the Forces (or in Chief) ———, to the General or Officer Commanding ———, not under the rank of a Field Officer (5).

(N.B.—The names of the Officers are not inserted. The Warrants under the Sign Manual are not personal in any case. The addition of a seal is not considered necessary.)

1272. By virtue of a Warrant under Her Majesty's Sign Manual, bearing date the ——— day of ——— 187—, authorizing me (amongst other things) to direct my Warrant to any Officer (not under the rank of a Field Officer) having the Command of a body of Her Majesty's Forces, authorizing him to convene Courts Martial for the Trial of any Offence against Military Discipline, committed by any Officer or Soldier under his Command; whether such offence shall have been committed before or after such
1273. Officer shall have taken upon him his Command, and also authorizing him to exercise in respect of the Proceedings of such Courts Martial all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War; or if I should so think fit, directing him to refer the proceedings of all or any such Courts Martial to me, in which case I am thereby authorized to exercise in respect of the proceedings so referred all the powers of a confirming Officer in accordance with the said Mutiny Act and Articles of War: I do hereby authorize you to convene
1274. [General and] District or Garrison Courts Martial, for the aforesaid purposes, and according to the powers and directions contained in the Mutiny Act and Articles of War.
1275. [And you are hereby directed to cause the proceedings of such Courts Martial to be transmitted to me, or other the General or Officer commanding the Forces.]
1276. And I further authorize you to confirm the proceedings of any such Courts Martial except in the case of a Commissioned Officer (or District or Garrison Courts Martial only), and to cause any sentence thereof to be put in execution, or to suspend, mitigate, remit,

(5) In detached situations beyond seas where a field officer is not in command, a captain may be authorized to convene district or garrison courts martial. M.A.6; § 291.

or commute, such sentence in accordance with the said Mutiny Act and Articles of War.

And in all cases of Commissioned Officers [or, and in all cases of Commissioned Officers who may be adjudged to suffer death, penal servitude, or cashiering,] as well as in any other instances wherein you shall think it proper to suspend the execution of any sentence, you are to transmit the proceedings to me, or other the Officer commanding the Forces.

1277.

And for executing the several powers herein expressed, these shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

1278.

Given under my Hand at ——— this ———
day of ———

(Signature.)

By Order of ——— Commanding the Forces.

(Signature.)

Assistant Adjutant General (or Military Secretary).

Note.—Where it may be deemed expedient to authorize an Officer at any station to confirm certain sentences, the paragraphs, *in italic*, § 1276–7, may supersede the paragraph, § 1275, [within brackets.]

No. VII.

Form of Letters Patent—Judge Advocate General—§ 462(2).

VICTORIA, by the GRACE of GOD, of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith, TO ALL TO WHOM *These Presents shall come, Greeting*: WHEREAS, We did by our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the ——— day of ———, in the ——— year of Our Reign, give and grant unto Our right trusty and well-beloved Councillor ———, the Office and Place of Advocate General or Judge Marshal of all Our Forces, both Horse and Foot, raised or to be raised for Our Service within the said United Kingdom of Great Britain and Ireland, and in all other Our Dominions and Countries whatsoever (except Our Dominions where particular Advocates General or Judges Marshal are appointed), to hold, use, exercise, and enjoy the said office and place unto him the said ———, by himself or his sufficient

1279.

[§ (1)]

Deputy or Deputies, for and during Our Pleasure as by the said recited Letters Patent (amongst other things therein contained, relation being thereunto had), may more fully and at large appear: NOW KNOW YE that We have revoked And determined, and by these Presents DO revoke and determine the said recited Letters Patent, and every Clause, Article, and Thing therein contained, and FURTHER *know ye* that We of Our especial grace, certain knowledge, and mere Motion, and for and in consideration of the good and acceptable Services to Us done, and to be done, by Our trusty and well-beloved ———, as also for and in consideration of the Learning, Skill, and Ability of the said ———, HAVE given, and by these Presents DO give and grant unto the said ——— the said Office and Place of *Advocate General* or *Judge Marshal* of all Our Forces, both Horse and Foot, raised or to be raised for Our service within Our United Kingdom of Great Britain and Ireland, and in all other Our Dominions and Countries whatsoever (except Our Dominions where particular Advocates General or Judges Marshal are appointed), to HAVE, HOLD, *use, exercise, and enjoy* the said office and place unto him the said ——— by himself or his sufficient deputy or deputies for and during Our pleasure, the same to be exercised according to the power and authorities given and allowed in and by an Act of Parliament made in the first year of the reign of Our late Royal ancestor, King George the First, entituled “An Act for the better regulating the Forces to be continued in His Majesty’s service, and for the payment of the said Forces and of their Quarters,” (6) and according to such other Act or Acts of Parliament as shall from time to time be in force, allowing the executing martial law within the places aforesaid, together with all salaries, fees, pay, allowances, entertainments, profits, lodgings, and rooms for the office, rights, privileges, advantages, and emoluments whatsoever, to the office and place of advocate general or judge marshal of Our said United Kingdom belonging or in anywise appertaining in as full and ample manner as the said ——— or any other person or persons hath or have held and enjoyed the same; And by these presents give and grant unto the said ———, and to his sufficient deputy or deputies, full power and authority at such time and times when martial law shall be allowed to be exercised as aforesaid, to administer an oath to any court martial or to any person or persons that shall be examined as a witness or witnesses in any cause, trial, or hearing before a court martial or any commissioners or persons

1280.

1§100(1)]

1281.

(6) This act (1 Geo. 1, st. 2, c. 3) was the earliest of the three mutiny acts passed the first year of this reign.—*See* § 92(1).

whatsoever appointed or to be appointed to examine, hear, or determine any matters or complaints touching or in anywise concerning any military affairs whatsoever: AND WE DO *hereby* likewise grant unto the said ———, or to his deputy or deputies, full power and authority from time to time to administer an oath to any person or persons in order to the better discovering of the truth of any matter, cause, or thing which shall be at any time referred to or brought before him or them relating to any complaint or otherwise in any military matter whatsoever, at such time and times when martial law shall be allowed to be executed as aforesaid: And for the better advance of Our service in the execution of the said office, Our express will and pleasure is, that all Officers and Soldiers of Our said Land Forces obey him, the said ———, as Our Advocate General or Judge Marshal, in that behalf constituted and appointed as aforesaid: And We also will that the said ——— observe such orders as he shall from time to time receive from Us or any Commanders in Chief for the time being of Our said Land Forces, now or hereafter to be by Us thereunto authorized and commissioned: IN WITNESS whereof, We have caused these Our letters to be made patent: WITNESS Ourself at Our palace at Westminster, this ——— day of ———, in the ——— year of Our reign.

[§100a]

1282.

By Writ of Privy Seal.



No. VIII.

Form of Deputation or Warrant (General)—Deputy Judge Advocate.

By the Rt. Honble. ———, Judge Advocate General of Her Majesty's Forces, to ———.

1283.

By virtue of the power and authority to me given by Her Majesty, and by virtue of all other powers and authorities to me on that behalf given by any Act of Parliament now in force, or hereafter to come in force, I do hereby appoint you, the said ———, to act as Deputy Judge Advocate at all trials by General Courts Martial, and in all matters appertaining to that office

K K

which shall concern any of Her Majesty's Land Forces from time to time serving in ———.

Given under my hand and seal this ——— day of ———, 187—, in the ——— year of Her Majesty's Reign.

(Signature of the Judge Advocate General.) (SEAL.)

No. IX.

Form of Deputation or Warrant (Special)—Deputy Judge Advocate.

By the Rt. Honble. ———, Judge Advocate General of Her Majesty's Forces, to ———.

1284. By virtue of the power and authority to me given by Her Majesty, I do hereby appoint you, the said ———, to act as Deputy Judge Advocate at a General Court Martial to be holden for the trial of ———.

Given under my hand and seal this ——— day of ——— 187— in the ——— year of Her Majesty's Reign.

(Signature of Judge Advocate General.) (SEAL.)

No. X.

Form of Warrant—Officiating Judge Advocate—Abroad.

By (His Excellency) the General (or Officer) Commanding (the Forces) [the troops] ——— to ———.

1285. By virtue of the power by Her Majesty to me given [by ——— to me delegated], I do hereby *nominate and appoint* [appoint] you, the said ———, to execute the office of Judge Advocate at a General Court Martial to be assembled at ——— on the ——— day of ———.

Given under my hand at ———, this ——— day of ———, 187—.

(Signature.)

Commanding the Forces (or in Chief).

By order of (His Excellency) ——— Commanding, &c.

(Signature.)

Assistant Adjutant General (or Military Secretary).

No. XI.

Form of Warrant—President of a General Court Martial.

To ———

&c. &c. &c.

By virtue of Authority in me vested [a Warrant from the ———
 Commanding ———], I do hereby appoint you the said ———
 to be President of a General Court Martial to be holden at ———
 on the ——— day of ——— for the trial of such prisoner or
 prisoners as may be brought before it [for hearing and examining
 into all such matters as may then and there be brought before
 it]. And, for so doing, this shall be to you and all others con-
 cerned a sufficient Warrant.

1286.

[§ 278.]

Given under my hand at ———, this ———
 day of ———, 187—.

(Signature.)

By Order of ——— Commanding the Forces.

(Signature.)

Assistant Adjutant General (or Military Secretary).

No. XII.

Form of Summons to a Civil Witness.

To ———

Whereas a ——— Court Martial has been ordered to assemble
 at ——— on the ——— day of ——— 187—, for the trial of
 ———, of the ——— regiment, I do, by virtue of the authority
 vested in me by the thirteenth section of the Mutiny Act,
 summon and require you A—— B—— to attend, as a
 witness, the sitting of the said court at ——— on the ———
 day of ———, at ——— o'clock in the forenoon [and to bring
 with you the documents hereinafter mentioned, namely ———],
 and so to attend from day to day until you shall be duly dis-
 charged; whereof you shall fail at your peril.

1287.

1288.

Given under my hand at ——— on the ———
 day of ——— 187—.

(Signature.)

Deputy (or Officiating) Judge Advocate
 (or President).

No. XIII.

1289. *Form —. Proceedings of a General Court Martial, [§ 480] together with forms in which some of the more unusual incidents in the examination of witnesses, &c., may be recorded. (1)*

1290.

Paging, § 482.

Heading.

Assembly of court, § 490.

Names, § 481.

Time, § 524.

Prisoner, § 478.

Orders and warrants, &c., § 493.

(1.)

Proceedings of a General [District or Garrison, &c.] Court Martial held at — on the — day of —, 187—, by order of — [by permission of — (2)] Commanding —, dated the — day of —, 187—.

President.

Members.

Rank.	Name.	Regiment.
_____	_____	_____
_____	_____	_____
_____	_____	_____

Rank—Name—Regiment.—Deputy [or Officiating] Judge Advocate.

At — o'clock the Court opens.

First day.

Rank—Name—Regiment. [(3) No.—Rank — Name—Regiment.] or [No. — Rank — (Acting rank —) Name — &c.] is brought a prisoner before the Court.

The order for convening the Court [and appointing of the President (*of minor courts martial*)], and the warrants appointing the President and Deputy [or Officiating] Judge Advocate are read.

The names of the President and Members of the Court are read over, in the hearing of the Prisoner, and they severally answer to their names.

(1) For general and district courts martial W.O. Form 642 is to be used—Q.R.App.B.

(2) In the case of minor courts martial permitted to try grave offences [§ 265].

(3) If the prisoner is a non-commissioned officer or private soldier the regimental number is prefixed. Acting bombardiers and lance-corporals are arraigned as gunners, drivers, sappers, privates, or as the case may be, their acting rank being added in a parenthesis.—See § 387, 688.

(2.)		Paging, § 482.
Question by the President to the Prisoner.	1. (4) Do you object to be tried by me as the President, or by any of the officers whose names you have heard read over ?	1292. Proffer of challenge, § 495.
Answer.	The Prisoner does not object to any officer.	None made.
Answer.	<i>(The Prisoner objects to the President.)</i>	1293. President challenged, § 497. For cause, § 500.
To prisoner.	2. State your objection.	
Prisoner.	The Prisoner thereupon states that — — .	Objection, § 502-514. j
Question by Prisoner.	The Prisoner, in support of his objection, requests permission to call ——— .	
Answer.	——— is called into Court, and is questioned by the Prisoner. i	
Question by President.	<i>(The objection to the President, together with any evidence, is recorded on the proceedings, and any explanation or statement is made by him in open court, as by any other officer.)</i>	
Answer.	The Prisoner has no further questions to ask [nothing further to add].	
Question by Prisoner.	The Court is cleared. [§ 497 n]	
Decision.	The Court by a majority of two-thirds, [§ 616 n,] disallow the objection. Or The Court suspend (5) their proceedings, and refer the Prisoner's objection to the convening officer. At — o'clock the Court resume their proceedings, and a letter (&c.) is read to the Prisoner, marked —, and attached to the proceedings.	Disallowed by court. 1294. Referred to appointing authority, § 497.
Answer.	<i>(The Prisoner objects to — and —)</i>	1295. (a.) Objection to member.
To the Prisoner.	3. State your objection to [the senior of these officers, § 497 n].	
Prisoner.	The Prisoner, in support of his objection, &c. (as above, § 1293).	
Decision.	The Court is cleared. The Court disallow the objection. The Court is re-opened and the above decision is read to the Prisoner.	Challenge overruled by court made known, § 501.

(4) "The questions are to be numbered throughout consecutively in a single series. The letters Q and A in the margin may stand for 'Question' and 'Answer,' respectively."—Q.R. App. B (1).

(5) Unlike the Articles of War, the text of the Queen's Regulations, &c., "court," when not used of the place of assembly, throughout the form in Appendix B is employed in the plural, except that, B (8), [§ 1332] the phrase "brought before it" is retained.

1296.
(b.) Evidence received as to alleged ground of challenge, § 500.

Trial of challenge.

Prisoner's remarks.

Challenge allowed by court,

and notified to prisoner, § 50.

The Prisoner, in support of his objection to ———, requests permission to call ———. Objection to ———

(The member objected to) replies [explains] ———. Statement ——— and with the permission of the President proceeds to call ———. Question by ———

(The Court has no power to administer an oath to witnesses, § 500, but they are examined in the usual order, § 953). Answer. Question by Prisoner.

The Prisoner requests permission to observe.

The Court is cleared.

The Court allow the objection.

The President informs ——— that he is not required to serve on this Court Martial.

The Court is re-opened, and the above decision is made known to the Prisoner.

1297.
New member, § 499.

(Rank — Name — Regiment) takes his place as a member of the Court. New member.

3. Do you object to be tried by ——— as a member of this Court Martial? Question to Prisoner.

Answer.

(Any objection is dealt with as in the case of an original member.—§ 1295.)

1298.
Court sworn, § 520. (Affirmation is allowed. § 448). Consider charges, § 404, 457, 551.

The President, Members, Judge Advocate, [Short-hand writer] and officers attending for instruction, are duly sworn.

("Instruction.—No Court Martial should proceed to trial until they have satisfied themselves of their competence to deal with the charge, both as respects their jurisdiction and the precision with which the charge is worded."—Q.R. App. B(2)3).

The Prisoner (Rank — Name — Regiment. [(No.—Rank—Name—Regiment.)]) is arraigned on the following [Charges] Charge:—

(Charge or charges at length.)

4. Are you guilty or not guilty of the charge against you which you have heard read? Question to Prisoner.

a. Not guilty or guilty.

Answer.

("Instruction.—It is generally advisable that the witnesses be ordered out of Court at this stage of the proceedings."—Q.R. App. B(2) 1.)

1299.
Arraignment, § 550.

Plea of "guilty" or "not guilty."

1300.
§ 559, 942.

Plea.	b. The Prisoner not pleading [refusing to plead] to the above charge, the Court enter a plea of "not guilty."	1301. The prisoner stands mute, § 565.
Plea.	c. The Prisoner pleads _____ (in bar of trial). The Court disallow the plea in bar of trial, and require the Prisoner to plead to the charge, or,	1302. Plea in bar, § 556-566, disallowed.
Question to Prisoner.	5. Have you any evidence to produce in support of your plea?	1303. Enquired into, § 587,
Answer.	_____ (Witness examined on oath.) The Court are of opinion that the Prisoner has not [has] substantiated his plea, and in consequence proceed with the trial [do therefore adjourn until further orders].	not allowed, allowed.
Prosecution.	(Rank—Name—Regiment) appears as Prosecutor, and reads an address, which is marked _____, signed by the President, and attached to the proceedings [or, the following address, (when not long)]. The Prosecutor proceeds to call witnesses.	1304. Opening address of prosecutor, § 570.
First witness for prosecution.	(In those exceptional cases where the prosecutor is required to give evidence for the prosecution, it is given on oath, in the form of a statement, and entered on the proceedings as that of any other witness.) (The Prosecutor) being duly sworn states, "I," &c. Cross-examined by the Prisoner.	1305. Prosecutor, if a witness, is the first sworn, § 571, 545.
Question.	6. _____	Gives his evidence in chief, § 564 by way of narration, § 571.
Answer.	_____ (The Prosecutor is then cross-examined by the Prisoner, unless he asks for leave to defer it, § 577.) Or, The Prisoner is permitted to defer his cross-examination. Or, The Prisoner declines cross-examining this witness. (6)	Prosecutor cross-examined by prisoner, § 570. 1306. Cross-examination deferred, declined.

(6) "Instruction.—In every case where the prisoner does not cross-examine a witness for the prosecution, this statement is to be made in order that it may appear, on the face of the proceedings, that he has had the opportunity given him of cross-examination."—Q.R. App. B(3). See § 570.

1307.

Witness sworn,
§ 445;
affirms, § 452;
declares, § 453.

1308.

Examination
of witness.

The Prosecutor proceeds to call witnesses.
(*Rank—Name—Regiment*) being duly sworn, First witness
[or having made the prescribed solemn affir- for prosecution.
mation, or promise and declaration,] is exam-
ined by the Prosecutor.

7. (*Question to witness, numbered, see note 4.*) Question.
(*Answer by witness.*) Answer.

Cross-examined by the Prisoner.

8. — — — — — — — — — Question.
— — — — — — — — — Answer.

Re-examined by the Prosecutor.

9. — — — — — — — — — Question.
— — — — — — — — — Answer.

Examined by the Court.

10. — — — — — — — — — Question.
— — — — — — — — — Answer.

The witness withdraws.

(*Witness's deposition read to him, § 578.*)

("Instruction.—*There is to be a line drawn
between the recorded evidence of every two
witnesses.*"—Q.R. App. B (3).)

1309.

The prisoner
defers his cross-
examination,

§ 577, or declines
to cross-
examine.

— being duly sworn (&c., as above, Second witness
§ 1307) is examined by the Prosecutor. for prosecution.

(*Question and answer as above, § 1308*)

The Prisoner requests permission to defer his
cross-examination of the witness. (7)

The Prisoner declines cross-examining this
witness.

The witness withdraws.

— being duly sworn, is examined by the Third witness
Prosecutor. for prosecution.
(*The examination, &c., proceeds as above, § 1308. Question by, &c.*)

(7) § 577. When the prisoner defers the cross-examination he usually re-
quests permission to defer it to the close of the prosecution. At the trial of Lt.
Colonel Crawley, he postponed the cross-examination until the next day, the
court making no objection (Q.6). On a similar occasion (*Sixth Day, Q.392*) the
court granted his request, with the remark that it was "a departure from the
ordinary rules, on which courts are generally conducted."—*Printed Trial*, pp.
9, 30.

Court adjourn. At ——— o'clock the Court adjourn until ——— o'clock on ———. (*If trial continued after four o'clock, the reason must be recorded.*)

1310.
Adjournment later than four if necessary, §524.

Second day. On ———, the ——— of ———, 187 —, at ——— o'clock, the Court re-assemble, pursuant to adjournment, present the same members as on ———.

Incidents on the Court re-assembling, §526 : all present.

(*Rank—Name—Regiment*) being absent.

(*The absence is accounted for*) [dead, prisoner of war].

1311.
Member absent, §526.

The Judge Advocate produces a medical certificate, which is read, marked —, and attached to the proceedings.

Member sick.

Court adjourn. The Court adjourn until ———.

§526.

The Court, being below the number required by the mutiny act, adjourn until further orders.

§525.

There being present (*not less than the least number required by the mutiny act*) members, the trial is proceeded with.

§526.

——— day. On ———, the ——— of ———, 187—, at ——— o'clock, the Court re-assemble in pursuance of a ——— order by ———.

1312.

(*No proceedings can take place in the absence of either President or Judge Advocate.*)

——— A warrant is read, bearing date ———, appointing (*the senior member*) President of the Court Martial in the place of ——— who — — —.

New President, §529.

The trial is proceeded with.

——— A warrant is read, bearing date ———, appointing ——— to act as Judge Advocate in the place of ———, who — — —.

1313.
New Judge advocate sworn, §532.

——— is duly sworn.

The trial is proceeded with.

Surgeon (*Name—Regiment*) questioned by Court, or

1314.
Prisoner sick, §535. See §536, &c.

A medical certificate is laid before the Court.

Examination [cross-examination, &c.] of ——— continued [&c., as above, §1309].

1315.
Incidents in the examination of witnesses.

The witness withdraws.

Interpreter
sworn, §477.

As to incidents
on interpreta-
tion, §479.

1316.
Objection to
question

by opposite
party, §574.

1317.
Decision of court
allowing ques-
tion.

1318.
Question pro-
posed by a mem-
ber, questioned,
§575.

Question
withdrawn.

1319.
Witness claims
privilege in not
answering ques-
tions tending to
criminate or
degrade, §981-9.

§980.

1320.
Correction by
witness, before

(——) duly sworn, and is examined — witness
through the interpreter [or —— as inter- for prosecution.
preter].

*(The interpreter may be sworn at any part of
the proceedings, and whenever the testimony of a
witness is received through an interpreter it should
be noted on the proceedings.)*

11. *(The question is entered on the proceedings,* Question by
§ 576.) Prosecutor.

The President [the Judge Advocate] objects
to this question.

The Prisoner objects to this question [sub-
mits that this question — — —, &c.]

Answer by Prosecutor.

Reply by Prisoner.

The Court is cleared.

The Court decides — — [suggests an alter- Decision.
ation.]

The Court re-opens and the above decision
is read.

12. *(If not disallowed)* Question (number) Question
[as altered by the Court] is put to the witness. repeated.

13. *(Question by a member.)* Question by

The —— requests that the sense of the the Court :
Court may be taken as to the above question. objected to :

The —— does not wish to press the withdrawn.
question [with reference to the objection ob-
serves — — —.]

The witness [claims the protection of the Objected to
Court,] submits that this question tends to by witness.
criminate [to degrade] him.

The Court is cleared.

Court cleared :

The Court decide — — — —.

The Court re-opens and the above decision is Decision.
read.

The question is repeated to the witness, who
[states in reply] declines to answer it.

—— being duly sworn (*is examined,* —— witness
&c., as above). for prosecution.

Upon the above evidence being read over to the witness,

Correction.

a. He points out that he had said — — —
and not — — — as has been taken down —
(See above, Question — — marked — — in the
margin. (8))

b. He asked [to explain] to add — — —.

(The witness may be examined and re-examined with reference to any fresh statement.—§ 960.)

The witness withdraws.

The prosecution is closed.

leaving the Court,
(\$960),
of a mistake in
recording his
evidence,

of an inaccuracy
of his own in
giving it.

**The prosecution
is closed.**

Question by Judge Advo- 14. Do you intend to call any witness in your defence?

cate [President Yes. *[or as it may be.]*

of minor courts]. (If the Prisoner answers in the negative, the Prosecutor thereupon addresses the Court a second time, § 582.)

DEFENCE.

Defence.

The Prisoner having been called upon to make his defence, *a. says (taken down as nearly as possible in his own words and in the first person).—* Q.R. App. B. (4).

b. requests to be allowed——[hours] days to prepare his defence [and to refer to the proceedings].

The Court grant this request, and adjourn at
 — o'clock until —, the — day of
 —, at — o'clock A.M.

The Prisoner reads an address [or requests permission for ——— to read his address for him, § 586], which is marked ——— and attached to the proceedings.

The Prisoner proceeds to call witnesses.

(Rank—Name—Regiment, &c.) is duly sworn.

**First witness
for defence.**

Question.

Answer.

(The Prisoner first examines witnesses to meet the charge, and secondly to speak to character, § 584.)

(Witnesses for the defence may be cross-examined by the Prosecutor, re-examined by the Prisoner, and questioned by the court.)

The witness withdraws.

1321.
Question by
Judge Advocate,
§ 582a.

Prosecutor's
second address,
or as in §1328.

I 322.
Prisoner's
first address,
§583.
Access to pro-
ceedings, §483.

**Court adjourn,
prescribes
conditions,
§488.**

I 323.
Prisoner's address, § 587-597.

1324.
Witnesses for
defence.

§ 584.

(8) No erasure is permitted (*see* § 482, 578), but a reference to the correction made in the margin where the mistake occurred.

1325.
Witness for
prosecution
recalled for
defence, § 579.

1326.
Prisoner's
closing ad-
dress, § 598;
(a) taken down by
judge advocate,
in first person,
(b) prepared
in writing.
§ 1047.

1327.
Prisoner's
address is
deferred when
evidence allowed
in reply, § 603.

Prisoner's
closing address,
§ 605.

1328.
Prosecutor's
reply restrained,
§ 606-7.

Rejoinder (9).

1329.
Summing up
prepared in
writing, § 608.

Prosecutor not
necessarily
present.

_____ is again called into Court and Second witness
is examined on his former oath. for defence.

(The examination of all the witnesses for the Question, &c.
defence is conducted in the same order, § 1324.) Answer.

The Prisoner closes his defence

a. with the following words, (taken down, as in
§ 1322). b. reads an address which is marked
_____, signed by the President, and attached
to the proceedings.

The Prisoner lays before the Court certificates
from _____ and _____ which are read, and
are marked [copies thereof are marked] _____,
signed by the President, and attached to the
proceedings.

("Instruction.—If necessary the Court may
now be adjourned to enable the Prosecutor to pre-
pare his reply; the fact of adjournment being
recorded as before."—Q.R. App. B (6).)

The Prosecutor requests permission to bring Application by
evidence in reply. Prosecutor.

The Prisoner requests permission to observe

The Prosecutor replies — — —

(a) The Court decide the Prosecutor is not Decision.
entitled to adduce evidence in reply.

(b) The Court will receive evidence in reply.

(Extent of Prosecutor's examination, § 601.)

The Prisoner closes his defence (as above,
§ 1326).

The Prosecutor declines making a reply.

Or, the Prosecutor reads his reply, which is Reply.
marked _____, signed by the President, and at-
tached to the proceedings.

(At minor courts martial only) (9)

The prisoner requests permission to (offer observa-
tions on the prosecutor's reply. § 606-7)

At _____ o'clock the Court adjourn until _____
to enable the Deputy Judge Advocate to pre-
pare his summing up.

The Court re-assemble on _____, and
the Prisoner being present the Deputy Judge
Advocate reads the summing up, which is Summing up.

(9) At minor courts martial, there being no Judge Advocate and no summing
up, the claim of the prisoner to observe on the reply (or rejoin), is not affected
by the new regulations. See § 609.

marked ———, signed by the President, and attached to the proceedings.

Or, The Judge Advocate does not think it necessary to sum up.

The Court is cleared [*or retire*] for the purpose of considering the Finding.

FINDING.

Not guilty.

The Court find that the Prisoner (*Rank—Name, &c., or No.—Rank—Name, &c.*) is not guilty of the charge.

Insane.

Is not guilty on the ground of insanity.

As to honourable acquittal, see § 624.)

———witness

for ——re-called.

——— is recalled and the prosecutor and prisoner being present is re-examined on his former oath.

Question

14. (*Question by Court, § 613.*)

by court.

The Court is cleared.

Guilty.

or, is guilty of the charge [all the charges];

Guilty in part.

or, is guilty of the first charge and guilty of the second charge with the exception of—— (10)

or, is not guilty of desertion, but is guilty of absence without leave—— —. (A.W. 43, § 184.)

PROCEEDINGS BEFORE SENTENCE.

The Court being re-opened, the Prisoner is again brought before it.

(*Rank—Name—Regiment*) is duly sworn.

Question by

the President.

15. What record have you to produce in proof of former convictions against the Prisoner?

Answer.

I produce a certified extract from———(*Form at end of App. No. 4*) *or, There are none.*

This document being read, compared with the original, and found correct (11), is marked ———, signed by the President, and attached to the proceedings.

Summing up dispensed with. § 608.

Court cleared. § 454.

1330.
Finding or opinion, § 614.

Insanity, § 590.
Acquittal not declared, § 624.

1330.*
Witness recalled by court for essential question.

1331.
Conviction.
Partial—

Of substance of charge, § 622.

1332.
Enquiry as to previous convictions, § 626.
Of officer, § 627.

1333.

(10) Instead of specifying the part of the charge of which the prisoner is acquitted, which was always the more usual practice, and is now prescribed in the authorized form, it might in some cases be preferable to recite that part of the charge only which was proved. *See also § 630 n.*

(11) The law having provided (A.W. 155, 156), that previous convictions may be proved by the entry in the court martial book or default book, or "*by a certified copy of such entry,*" the comparison in court would seem to be necessary only in those cases where the original books are produced, instead of the mere production of copies duly certified by the officer to whose custody the books are entrusted. *See § 1028.*

(Where soldier found guilty of drunkenness.)

1334.
Former in-
stances of
drunkenness.

16. How many times has the Prisoner's name been entered in the ——— defaulter book for drunkenness. (12)

On reference to the regimental [troop, battery, or company], defaulter book now laid before the Court, it appears that the Prisoner's name has been recorded therein for the crime of drunkenness ——— times since his enlistment (13).

1335.
Enquiry as
to unexpired
sentence.

17. Is the Prisoner under any sentence at the present time?

(Penal Servitude, Imprisonment, Forfeiture of Service, &c.)

In cases of
desertion.

18. Did the Prisoner surrender or was he apprehended? (14)

("In a case of desertion it is to be asked and recorded whether the Prisoner surrendered or was apprehended."—Q.R. App. B (8) Instruction.

1336.
General cha-
racter, &c.,
of officer is not
enquired into,
§ 627 (6).

(If a soldier)

19. What is the Prisoner's general character? Question.
(As to answer, see § 635.) Answer.

20. What is his age? Question.

21. What is the date of his attestation? Question.

22. What service is he allowed to reckon towards discharge? Question.

23. Is the Prisoner in possession of any decorations, good conduct badges, or honorary rewards? Question.

Cross-examined by the Prisoner.

Prisoner may
cross-examine
witness to
general char-
acter, &c. § 635.

24. ——— Question.
or, The Prisoner declines cross-examining this witness. (See note 6. § 1306.)

The Court is again cleared.

SENTENCE.

1337.
Sentence, § 644.

The Court sentence the Prisoner (Rank—Name—Regiment) or, No.—(Rank—Name)—Regiment. Sentence.

("Instruction.—The sentence is to be marginally noted in every case."—Q.R. App. B (9.)

Death, § 645.
Penal servitude,
§ 646-7;
if under sen-
tence, § 648.

a. to suffer death by being shot [hanged]. Death.
b. to suffer penal servitude for the term of ——— years [or for life]. ——— years.

(12) W. O. Form 642. (H.) Jan. 1874.

(13) See A.W.78 [§ 632], and Instruction, Q.R. App. B. (8).

(14) It will be observed that this instruction requires that the question shall

Cashiered.	c. to be cashiered [or dismissed, discharged].	Cashiered, &c., § 668-9.
Reprimand.	cc. to be [publicly, severely, privately] reprimanded.	Reprimands, § 670.
Fined. £—, —, —.	d. to be fined — pounds — shillings — pence.	Fine, § 206, 211.
Reduction.	e. to be reduced to the ranks.	Reduction, § 687-8.
Impt. H.L. for — days.	f. to be imprisoned with hard labour [with such labour as, in the opinion of the medical officer of the prison he may be equal to] for — days.	1338. Imprisonment, § 680-4.
84 days' Impt. H.L. and S.C.	g. to be imprisoned for eighty-four days, forty-two of the said eighty-four days to be solitary confinement (<i>the maximum of solitary confinement</i>), such solitary confinement not to exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, the remainder of imprisonment to be with hard labour (<i>or as in f.</i>).	Solitary, § 681-3.
— Days' Impt. H.L. and S.C.	h. (<i>when the imprisonment awarded exceeds 84 days</i>) to be imprisoned for — days, — of the said — days to be solitary confinement, such solitary confinement not to exceed seven days in any twenty-eight days, with intervals between the periods of solitary confinement of not less duration than such periods, the remainder of the imprisonment to be with hard labour (<i>or as in f.</i>).	(When not to be awarded, § 181).
Stoppages.	i. to be put under stoppages of pay until he shall have made good the following articles, viz.: — [or until he shall have made good the sum of — as the case may be.]	1339. Stoppages. A.W. 180, 181. § 689-690. Corporal punishment, § 673.
— Lashes.	j. to suffer a corporal punishment of — lashes, and to be imprisoned, &c. &c. (<i>as in f, g, or h.</i>)	
Forfeiture badges for — months.	k. And in addition to forfeit absolutely [or for any period not less than eighteen months, as the case may be]—(<i>Here specify number of badges</i>) good conduct badge [or badges] and pay which he has earned by his past service.	1340. ADDITIONAL Forfeitures, § 123.
Forfeiture annuity	or, to forfeit the annuity [gratuity, medal, (<i>describe the medals</i>) or decoration (<i>here specify each</i>)] which has [have] been granted to him.	

be asked at this stage of the proceedings. In ordinary cases evidence as to this fact—as to which the descriptive return (M.A. 34), is sufficient—ought to have been given by the prosecutor, as is pointed out by the regulations.—App. C. 10, *note*.

Discharged
with ignominy,
§ 125, 1350.

1341.

Signature of
president, &c.,
§ 692.

Minute of
Confirmation.
§ 720.

1342.
Revision,
§ 721, 729.

Order, &c.,
§ 722-3.

1343.
Prescribed form
of revised
findings.

Sentence.

or, to forfeit all or any advantage as to pen- Forfeit past
sion which has been earned by past service. service.

or, to forfeit all right to good conduct pay, Forfeit past
and to pension on discharge whether in respect and future
of past or future service. service.

n. The Court do further sentence him to be Discharge with
discharged with ignominy from Her Majesty's ignominy.
service.

Signed at ———, this ——— day of ———,

18—.

(Signature.)

(Signature.)

President.

Judge Advocate.

*("Space of at least half a page is to be left for
the remarks of the confirming officer, who is to state
the manner in which each case is to be disposed
of.")—Q.R. App. B. (10) Instruction.*

REVISION.

On ———, the ——— day of ———, at
——— o'clock, the Court re-assemble by order
of ———, for the purpose of reconsider-
ing their ———.

Present the same members as before. [§ 723.]

The letter [order or memorandum] containing
the instructions to the Court, and the reasons
of the confirming authority for requiring a re-
vision of the finding (or sentence) is read,
marked ———, signed by the President, and
attached to the proceedings.

The Court having attentively considered the Revised
observations of the revising officer, and the whole finding.
of the proceedings [or the opinion and sentence,
or the sentence, (if formal error only.)]

a. do now revoke their former finding, and
are of opinion, &c., or,

b. do now revoke their former sentence, and Revised sen-
now sentence the Prisoner, &c., &c., or, tence.

c. do now revoke their former finding and Revised
sentence. The Court are now of opinion, &c., &c. finding.

They now sentence, &c. (as in § 1337). (*When
any alteration is made in the finding, it is laid
down [Q.R. App. B. (11)] as absolutely necessary
that the sentence should be given afresh in cases
where the court adhere to their former sentence.*)

d. do now respectfully adhere to their former sentence [finding and sentence].

Signed at ———, this ——— day of ——— 18—.

(Signature).

President.

(Signature.)

Judge Advocate.

(Half a page for confirmation, as in § 1341.)

("No additional evidence for prosecution or defence can be received on the revision, and no portion of the original minutes can be altered."—Q.R. App. B. (11) "Instruction.")

§ 730.

Evidence as to previous convictions, § 734.

Confirmed.

Approved and Confirmed. (See § 730n, 5).

I confirm the finding and sentence of the Court, but [mitigate—commute] remit — —.

(Date.) (Signature of Confirming Officer.)

I hereby approve [As Civil Governor I further approve [(13)] the sentence of the Court upon [rank and name of Prisoner] in behalf of Her Majesty.

(Date.)

(Signature of Civil Governor.)(14)

(In the case of sentence of death or penal servitude awarded to a commissioned officer, or a sentence of death upon a person other than a commissioned officer, for a civil offence in India.)

The sentence of death [penal servitude] awarded by the General Court Martial held for the trial of — is approved by the Governor General [or Governor] in Council.

(Date.) (Signatures.)

I 344.
Confirmation,
§ 730.
Mitigation, § 733.
Remission, § 734.
Commutation,
§ 735-741.

I 345.
Approval of sentence of death by Civil Governor,
§ 712-13.

I 346.
Concurrence of Governor-General in Council, § 713.

The Civil Governor [Governor General in Council, &c.] not having approved the sentence of the Court, I commute [remit], &c.

(Date.) (Signature of Confirming Officer.)

I 347.
Revised confirmation,
§ 730n.

(14) This approval on behalf of Her Majesty is equally necessary to the carrying into effect of a capital sentence in those cases where the confirming authority also administers the civil government. [This is now inserted in the Queen's Regulations, App. B (10).]

SEPARATE LETTERS.

I 348.
Honourable
acquittal.

The desire of the Court to acquit an officer honourably is to be stated in a separate letter. [§ 624.]

I 349.
Recommendation to mercy.
§ 698.
Remarks, § 700.

"Instruction.—When the Court have passed judgment, and desire to recommend the Prisoner to the favourable [merciful] consideration of the confirming authority [§ 798], or to remark on the conduct of the parties before them; or on the manner in which a particular witness delivered his testimony, &c., &c., [§ 700] they are to embody their views in a separate letter, to be signed by the President, and forwarded with the proceedings to the confirming authority, or to the Judge Advocate General, as the case may be."—Q.R. App. B. (12).

Covering letter.

As to covering letter, see § 486 n.

I 350.

When the court abstains from sentencing a soldier convicted of disgraceful conduct to the forfeiture of good conduct pay, pension, medals, &c., a separate letter is no longer required.

No. XIV.

Form of Warrant under Sign Manual for convening General Courts Martial for the Auxiliary Forces.

(SIGN MANUAL.)

I 351.

UNDER the Provisions of "The Regulation of the Forces Act, 1871," and in pursuance of the Provisions of the Mutiny Act, and of Our Articles of War, We hereby authorize and empower you from time to time, as occasion may require, to convene General Courts Martial, for the Trial of any Officer or Soldier of the Militia, Yeomanry, and Volunteers under your Command, who shall be charged with any Offence against Military Discipline for which he is liable to be tried by General Court Martial, whether such Offence shall have been committed before or after you shall have taken upon yourself your Command. The said Courts Martial shall be constituted, and shall proceed in the trial of the Offenders, and in giving Sentence and in awarding Punishment, according to the powers and directions contained in the several Statutes relating to the said Militia, Yeomanry, and Volunteers respectively, and in the Mutiny Act and Articles of War.

I 352.

We are further pleased to order that the Proceedings of every such Court Martial shall be transmitted to Our Judge Advocate General, in order that he may lay the same before Us for Our consideration, and afterwards send them to Our Field Marshal

Commanding-in-Chief, or, in his absence, to the Adjutant General of Our Forces, for Our decision thereupon.

And for so doing, this shall be to you, and all others whom it may concern, a sufficient Warrant and Authority.

Given at Our Court at ———, this ——— day of ———,
187—, in the ——— Year of Our Reign.

By Her Majesty's Command.

(*Signature of Secretary at State.*)

To

The General
or Officer Commanding in

No. XV.

*Judgment of the Court of Error in the Exchequer Chamber—
Dawkins v. Lord Rokeby. [§ 332n.]*

(*Law Reports, 5 Q. B. 262-273.*)

THE judgment of the Court (Kelly, C.B.; Martin, Bramwell, Channell, Pigott, and Cleasby, B.B.; Byles, Keating, Brett, and Grove, J.J.) was delivered by Sir FitzRoy Kelly, Chief Baron, on the 1st of February, 1873:—

1353.

"The plaintiff, a colonel in the army, having been reported to have exhibited on several occasions a want of deference to some of his superior officers, and to have been guilty of other unofficer-like conduct, and also to have made certain charges against several of his brother officers; his Royal Highness the commander-in-chief was pleased to direct that a court of inquiry should be assembled, and that these matters should be inquired into and reported upon to him. A court of inquiry was held, and the defendant, Lord Rokeby, also an officer of rank in the army, was required to attend, and did accordingly attend as a witness before this court. Being examined as a witness, he gave certain *voir dire* evidence; and when the examination was closed, handed in to the court a written paper, containing in substance a repetition of the evidence which he had given by word of mouth, with some additions upon the same subject; and this paper was received by the court, and it must be presumed formed part of the minutes of the proceedings. A report was duly made to the commander-in-chief, and certain consequences followed, but which did not appear in evidence on this record. It was, however, stated that the plaintiff applied to the proper military authority for a court martial on the defendant, and that such

1354.

military authority, having power to grant or refuse the said court martial, refused to allow it to be held. Thereupon the plaintiff brought the present action, in which in the first count he charges the written paper above referred to as a libel; and in the second count the *vivâ voce* evidence as verbal slander.

1355.

The above facts appear to have been admitted at the trial; and the counsel for the plaintiff further offered to prove that the defendant, in delivering in the written statement and giving the *vivâ voce* evidence, acted *malâ fide* and with actual malice, and that the statements were made without any reasonable or probable cause, and with a knowledge on the part of the defendant that they were false. I need scarcely observe that neither the charge of malice and wilful falsehood, alleged on the part of the plaintiff to be capable of proof against the defendant, nor any charge of misconduct of any kind reflecting upon the plaintiff is to be taken to be true: (1) such charges having merely been assumed to be proveable for the purpose of argument, and in order to raise the questions to be determined in this cause. Upon these admissions and allegations the defendant's counsel insisted that the action was not maintainable, and the learned judge who tried the case declared his opinion that the evidence so offered was immaterial and irrelevant, and that as matter of law the action could not lie, if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *malâ fide*, and with actual malice, and without any reasonable and probable cause, and with the knowledge that the statements made and handed in by him as aforesaid, were false. Thereupon the counsel for the plaintiff objected to the ruling of the learned judge, and this court was now called upon to decide whether the judgment should be allowed.

1356.

We are all of opinion that the ruling of the learned judge at the trial was right, and that the exception must be disallowed. (2)

The authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary

(1) Lord Hartington, then Under-secretary of State for War, had stated in the House of Commons, on May 26th, 1865, that "They (the court of inquiry) added, and the commander-in-chief was most anxious that full prominence should be given to this addition—that nothing had come before them which was in any manner prejudicial to the character of [Lieutenant-] Colonel Dawkins as an officer and a soldier."—3 *Hansard*, clxxix. 896.

(2) The learned judge in delivering the judgment added: "Though we have not been entirely agreed as to all the reasons for our decision."—*Times*, Feb. 13, 1873.

course of any proceeding before any court or tribunal recognized by law."

After quoting other decisions to that effect the Chief Baron continued:

1357.

"Finally, in *Dawkins v. Lord Rokeby*, (3) an action between the present parties, tried before the late Mr. Justice Willes, that most learned and lamented judge, in alluding to the very evidence given by the defendant before the court of inquiry, which is the subject of the present action, observed: 'What he stated before the court he stated in the capacity of a witness; and assuming, apart from the reasons which I have already given, that no action would lie against him for what he did, there is the further overwhelming reason that witnesses are protected from actions for what they have stated in evidence in a court of justice; otherwise everybody in the witness-box would speak in fear of litigation, and no man who is called on to give evidence would be safe from some troublesome action being brought against him.' Upon all these authorities it may now be taken to be settled law that no action lies against a witness upon evidence given before any court or tribunal established according to law.

But it is insisted, on the part of the plaintiff, that a court of inquiry is not a court of law or a court of justice, and that witnesses before such a court are not within the protection of the law. On the other hand, it is contended, on the part of the defendant, that the evidence given by an officer in the army before a court of inquiry is a privileged communication, and cannot by law be made the subject of an action for defamation. It is further objected that any such evidence is part and parcel of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and as such ought not, except by Her Majesty's command or permission, to be produced, and are therefore wholly inadmissible in evidence; we are all of that opinion, and hold that, on that ground also, the exception must be disallowed.

It may be convenient to consider this point at once; for if it appear that the whole matter upon which the action is founded, whether the written statement handed in to the court or the oral testimony of the defendant, together with all secondary evidence of the one or the other, is inadmissible by law, and ought not to have been received or permitted to be read at the trial, it is difficult to see how the action can be maintained. A court of inquiry,

1358.

though not a court of record nor a court of law, nor coming within the ordinary definition of a court of justice, is, nevertheless, a court, duly and legally constituted and recognized in the articles of war and many acts of Parliament.

1359.

The 12th section (*sic*) of the articles of war provides: 'That if any officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding in chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state for war, to make his report to us thereupon, in order to receive our further directions.'

1360.

Now the mode in which the commander-in-chief examines into any such complaint is by instituting a court of inquiry. A court, therefore, so called into existence has all the qualities and incidents of a court of justice. It is convened in pursuance of the provision in the articles, and so under the express authority of Parliament, and of the Queen's Regulations, which, as set forth upon this record, (4) provide as follows:—'A court of inquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object such court may be directed to investigate and report upon any matter that may be brought before it; but it has no power to administer an oath, nor to compel the attendance of witnesses not military.' From this it follows that a military witness is compellable to attend and to give evidence. The regulations proceed:—'A court of inquiry is not to be considered in any light as a judicial body. It may be employed, at the discretion of the convening officer, to collect and to record information only, or it may be required to give an opinion also on any proposed question. The proceedings are to be recorded in writing as far as practicable in the form prescribed for courts martial, signed

(4) The paragraphs here quoted formed no part of the Queen's Regulations for the army on the 14th February, 1865, when Lord Rokeby made the statements before the court of enquiry which gave occasion for the legal proceedings referred to in the judgment.

They were transferred from the pages of a former edition of the present work to the Queen's Regulations in 1868; and consequently, as a matter of fact, they were to be found in the regulations when the judgment was delivered. But it cannot have been contended that these regulations had any retrospective action; and it is open to remark that—however far the fact of the author's statements remaining unchallenged, from their first publication in 1830 until they were adopted by authority in 1868, may be accepted as a proof of their correctness—the custom of the service was not alone relied upon, or the questionable reference to the regulations would not have been imported into the argument.—*Editor*, 1875.

by each member and forwarded to the convening authority' (in this case the commander-in-chief) 'by the president.'

Under these regulations, officers in the army, if required by competent military authority to attend, are compellable to attend and give evidence, not, indeed, by means of any known legal process, or under any penalty imposed by law, but in obedience to the duty they owe to the sovereign, and under peril of dismissal at the pleasure of the sovereign in case of disobedience. The evidence so given is in truth a communication made at the command of the sovereign, through the commander-in-chief, by a military officer, to an assembly of other military officers, upon a military subject, to be reported to the commander-in-chief, and by him to the sovereign, and all this in strict accordance with the Queen's Regulations. There is therefore no sound reason or principle upon which such a witness, called upon to give evidence in such a court, should not be entitled to the same protection and immunity as any other witness in any of the courts of law or equity in Westminster Hall. He is equally compellable to appear and give evidence, and punishable in case of refusal. And it would be unreasonable and unjust to hold him liable to a heavy punishment if he refuse to answer the question put to him, and liable to an action at law for damages if he answer them and his answers happen to reflect upon the character of another. It may be said that if the evidence given in a court of law be false, the witness is indictable for perjury; and that if he go out of his way to slander another by uttering irrelevant and defamatory matter he may be fined or imprisoned for a contempt of court.

But, besides that no punishment inflicted on a false witness affords compensation or redress to the party injured, a witness before a court of inquiry, if he defames the character of another by false and malicious statements, whether relevant or not to the matter inquired into, is equally subject to punishment with a witness in a court of law, and may be put upon his trial before a court martial, and if found guilty may be dismissed the service or otherwise dealt with as justice may require. And in this very case the plaintiff sought redress by demanding a court martial upon the defendant. And we must presume that his complaint was shown to be groundless, as the court martial was refused. And it was upon this refusal, as it should seem, that he brings this action in a court of law.

But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is, that by reason of the occasion on which they are made, the making of them is not such a publication as will support an action

1361.

1362.

1363.

for libel or slander. On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity, or in county courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either House of Parliament, or by ministers of the Crown in advising the sovereign, is absolutely privileged, and cannot be inquired into in an action at law for defamation. The case of *Home v. Bentinck*,⁽⁵⁾ when carefully considered, although decided upon a bill of exceptions to the rejection of evidence, is really an authority that the present action cannot be maintained; and, being a decision of the Exchequer Chamber, may be taken to have settled the law upon this important subject.

1364.

In that case, as in this, a court of inquiry had been held touching the conduct of the plaintiff, convened by the Duke of York, then commander-in-chief, and a report had been made and delivered personally by the president to his Royal Highness, and the action was brought by the plaintiff against the president, the declaration charging the report as a libel. The minutes, consisting of the evidence, and the report were produced at the trial by the military secretary of the commander-in-chief, and it was objected that these minutes ought not to be admitted and could not be read in evidence on behalf of the plaintiff. Abbott, C.J., held the evidence inadmissible, and it was rejected accordingly. The plaintiff then offered, as secondary evidence, a copy of the minutes; but this was also held inadmissible, and rejected by the Lord Chief Justice. Upon a bill of exceptions to the rejection of this evidence, the case came before the Exchequer Chamber, and was very elaborately argued, and all the authorities bearing upon the points in question were brought before the court by the late Mr. Joshua Evans. The court, however, disallowed the exception, and their judgment clearly shows that the entire proceeding before a court of inquiry is privileged, and cannot be produced or read in evidence in any trial at law. The court of inquiry was held to be 'an official proceeding, directed by the commander-in-chief, for the purpose of obtaining that information which he was bound to obtain as to the conduct of every officer holding a commission in the army, and in furtherance of the exercise of his public duty,' whatever it might be upon the result of such inquiry. The duty of the then defendant as the presiding officer was held to be imperative upon him, and the report which he had made an act of duty imposed upon him as a

1365.

(5) 2 Broderip and Bingham, 130.

military man by his superior officer the commander-in-chief, whose order he was bound to obey. It is impossible to deny that it was equally a duty imposed upon the defendant in the present case to attend as a witness and to give evidence upon the court of inquiry, as called upon to do by the president himself, acting under the orders of the commander-in-chief, and which orders the president and the defendant were alike bound by their duty to the sovereign to obey. And it was observed by Dallas, C.J., in delivering the judgment of the court in *Home v. Bentinck*, (6) that it was impossible not to see that the plaintiff in that case, when he became an officer in the army, in point of fact voluntarily subjected himself to that court of inquiry to which he must have known that officers in other instances had been made amenable. After remarking that the evidence had been returned and deposited with the commander-in-chief, the Chief Justice proceeds: 'The question then is, whether—I will not say Sir Henry Torrens would have been compelled to produce the result of this inquiry,—but whether if he under a mistake had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence.' And, further: 'This is an inquiry directed to be made by the commander-in-chief with a view to ascertain what the conduct of the party suspected might have been; in the course of which a number of persons may be called before the court and may give information as witnesses, which they would not choose to have disclosed; but if the minutes of the court of inquiry are to be produced in this way, or an action brought by the party, they reveal the name of every witness and the evidence given by each.

. . . It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate inquiry and the names of persons, stand protected.' And finally: 'It seems, therefore, to us, upon the broad principle of State policy and public convenience, and upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench was perfectly right in not suffering these minutes to be brought forward at the trial.' Surely this case—the decision of a court of error—is a conclusive authority that a court of

1366.

(6) 2 Broderip and Bingham, at pp. 161-164.

inquiry is a tribunal authorized, recognized, and sanctioned by law, and that the proceedings of such a court are privileged against publication, and are inadmissible upon the trial of an action like this. We cannot doubt, therefore, that if the attention of the judge who tried the cause had been called to this decision, although the parties had admitted the evidence in question, as given before the court of inquiry, he would have felt it, to use the language of Chief Justice Dallas, 'his bounden duty to have interposed and prevented the admission of such evidence.' If, then, in the present case the evidence of the proceedings before the court of inquiry were inadmissible by law, and ought never to have been permitted to be produced in court, how is it possible that this action can be maintained ?

1367.

But there is another and higher ground upon which we are of opinion that the defendant is entitled to the judgment of the court. The whole question involved in the cause is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a court of law. The attendance of the defendant as a witness, the duty to give evidence when called upon, the validity of the order to hold the court of inquiry, the effect of the evidence on the military character, and upon the military rights and liabilities of the plaintiff and indeed of the defendant, are purely questions of a military nature. The evidence itself was given by the defendant, a military officer, in his military capacity upon a military subject at the command of his military superior, and concerned the military conduct of another military officer. It may well be that the truth or falsity of the evidence given is also a military question, though apparently in terms a question of fact ; and that which the plaintiff might allege and a court of law or a jury might hold to be false, a military tribunal might hold, and rightly hold, to be true ; and as if the defendant had deposed that he had given an order to the plaintiff which it was his duty to have obeyed, but which he had disobeyed. The order might have been to seize a battery, and the plaintiff might have alleged that he had done all that could be done, and that it was impracticable, and that the defendant knew that it was so ; and a jury might find all this to be true. But an assembly of military officers might hold, and justly and truly, that the order might and could and ought to have been obeyed. With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton v. Johnstone* (1), and the cases *In re Mansergh* (2) and *Grant v.*

(1) 1 Term Reports, 493.

(2) 1 Best and Smith, 400 ; 30 Law Journal (Q. B.) 296.

Gould (3), *Barwis v. Keppel* (4), *Keighly v. Bell* (5), *Dawkins v. Lord Rokeby* (6), and *Dawkins v. Lord F. Paulet* (7) are all authorities to show that a case involving questions of military discipline and military duty alone is cognizable only by a military tribunal, and not by a court of law.

On the other hand, the case for the plaintiff when attentively considered is really destitute of all authority to support this action. No decision can be found that an action for libel or slander is maintainable upon evidence given before any tribunal constituted, sanctioned, or recognized by or according to law. There is, indeed, in the eloquent and powerful reasoning of Lord Chief Justice Cockburn, (8) in *Dawkins v. Lord F. Paulet*, much that is opposed to the view we take of the incompetence of a court of law to deal with purely military questions arising before a military tribunal. But the opinion thus delivered, though resting upon high authority, is no decision on the question before us, or upon any cognate question. And it is satisfactory to us to feel that the general question of privilege as applied to communication between military authorities upon military subjects, and whether before a military tribunal or otherwise, though governed and, as we think, for the present decided by the decisions referred to in the Exchequer Chamber, is yet open to final consideration before a court of the last resort.

It remains to us only to consider two cases upon which the plaintiff has relied as authorities in his favour. And, first, *Warden v. Bailey* (9), which, however, merely shows that the adjutant of a regiment of militia has (10) no authority to order a private to attend school and pay eightpence a month for instruction, and that trespass lies for causing him to be imprisoned in a common jail for disobedience of such order. This was not an

1368.

1369.

(3) 2 H. Blackstone, 69.

(4) 2 Wilson, 314.

(5) 4 Foster and Finlayson, 763.

(6) 4 Foster and Finlayson, 806.

(7) Law Reports, 5 Q. B. 94.

(8) The conclusion at which Sir A. Cockburn arrived was as follows:—"I cannot bring myself to think that it is essential to the well-being of our military or naval force, that where authority is intentionally abused for the purpose of injustice or oppression, where charges are preferred, which, to the knowledge of the party preferring them, are intentionally unjust; where representations are made which the party making them knows to be slanderous and false; the party injured, whose professional reputation may have been blasted, is to be told that the Queen's Courts, in a country whose boast it is that there is no wrong without redress, are shut to his just complaint."—*Dawkins v. Paulet*, Law Reports, 5 Q. B., 108-9.

(9) 4 Taunton, 67.

(10) "Has"—rather *had* in 1811, for the 32nd article of war [§ 215] was added with reference to this very case, and now renders absence from the garrison or regimental school, after a due order to attend punishable as disobedience of orders.—*Editor*.

1370. act done which, though in excess, was in the exercise of military authority or in the discharge of military duty, but was simply a wrongful and illegal act, without any colour of law, as if an officer had ordered a soldier to be imprisoned in a debtors' prison for non-payment of an alleged debt. *Dickson v. Lord Wilton* (1), also relied upon by the counsel for the plaintiff, is distinguishable in this, that the libel there charged was a communication made by the defendant to a higher military authority, not in any proceeding before a military tribunal, or in obedience to the order of a superior military officer, but which, though, as he alleged, in the discharge of his duty, was contended by the plaintiff to have been made, and was in fact made, voluntarily and of his own accord. But were the facts of the two cases identical? We think with the majority of judges in *Dawkins v. Lord F. Paulet* (2), that the motives, as well as the duty, of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a court of law to determine.

1371. It may also be observed that the case of *Dickson v. Lord Wilton* was a mere *nisi prius* decision, and not reviewed upon motion for a new trial; and that the ruling of Lord Campbell, that the communication, charged as a libel, though held by the secretary at war on behalf of the Crown, should be produced from his office and read in evidence, was directly at variance with the judgment of the Exchequer Chamber in *Home v. Bentinck* (3); and the decision that the communication itself was for the consideration of the jury upon the question of malice was inconsistent with the great mass of authorities above referred to.

On these grounds we are all of opinion that the exception in this case should be overruled, and that the defendant is entitled to the judgment of the court."

(1) 1 Foster and Finlayson, 419.

(2) Law Reports, 5 Q. B. 94.

(3) 2 Broderip and Bingham, 130.

INDEX.

ABA

ABANDONING fortress, post, or guard, 196
 seamen, 1105n
 Abatement, plea of, 389
 Abduction, 1147-9; wife competent to prove, 926
 Abettors, 1058
 Abominable crime, *see Infamous*
 Abortion, feloniously procuring, 1151-2
 Abroad, oppression or crimes committed, punishable at home, 753
 Absconding, recruits, 193n
ABSENCE from divine service, 215; parade, 215; school, 215, 1369
 as prisoner of war, 215, 348
illegal, court to record, 347; proceedings, evidence of fact, 1015
without leave, distinguished from desertion, 179, 182n; how proved, 347, 1015; may be found when desertion is charged, 184, 837; minute, 1331
 period, how calculated, 189n 190
 of soldier under five days, 189n; under twenty-one days, 187
 above twenty-one days must be tried by general or district C.M., 189-90, 313; unless superior officer dispense with trial, 189, 263
 not punishable with penalties peculiar to desertion, 185, 407; nor attended by the moral stigma, 182n
 pay and service forfeited during, 136; *see Forfeiture*
 when defence in bigamy, 1150n
 Abstract of evidence, 384n; may be furnished to prisoner before trial, 426; is always given in the navy, 426n

ACQ

Academy, R.M., Woolwich, 58n
 Access to proceedings out of court, 483
 Accessories, what, 1058; to felony only, *ib.*; trial of, 1062, 1063-4
ACCIDENTAL death, 1109
 injury, enquiry on, 345
 omissions, &c., in evidence or minutes, how corrected, 482, 578, 960, 1320
ACCOMPLICES may be tried together; *see Joint Trial, Confederates*
 competent witnesses, 868; 917
 require confirmation, 917
 rule as to cross-examination of, 962
 when excused from trial, 916
ACCOUNTS, signing in blank, 215
 admissions as to, 991
 Accoutrements, selling, &c. 215, 262
 Accusing of crimes, *see Threats*
ACQUITTAL, if votes equally divided, 616
 form, 624; objectionable, 630n, 1331n
 honourable, of officer, 624n
 promulgated without delay, 719, 757
 makes co-defendant competent witnesses, 918
 soldiers settled with on, 757
 not imperative, when misdemeanor charged and facts amount to felony, 848
 on score of insanity, 590, 1330
 previous, bar to trial, 560
 how proved, 1012; *see Substance of charge proved, Special finding*
ACQUITTED of desertion, absence found, 185, 834; minute of, 1331
 felony, attempt, &c., found, 832
 imputation, facts found, 622, 839
 murder, manslaughter found, 835

ACQ

ACQUITTED of robbery, assault found, 834, 1173
 scandalous conduct, breach of discipline found, 839-42
 ACTION, creating alarm in, 149, 215
 misbehaviour in, 195
 Actions against members, 266, 469, 750
 witnesses not liable to, 332
 Acts and declarations of co-mutineers, &c., 821
 Acts of parliament, 1022-1025
 Acts of state, evidence of, 1025; foreign and colonial, 1029
 Additional charges, 415
 ADDRESS of prisoner, 5818; read by friend, 585; not being professional adviser, 586n.
 court revised, prisoner having been restricted in, 725
 of prosecutor, 570; in reply, 609
 ADJOURNMENT, 525, 533-7; noted on the minutes, 466, 533; form, 1310
 to view, 429, 523; to examine witness, 941; to prisoner's quarters, 522n
 to procure evidence, 533
 Admiralty regulations, 337n, 426n
 ADMISSIONS of parties, 990-3; noted on minutes, 990, 1046
 before courts of enquiry, witness to be cautioned, 337; not to be given in evidence at courts martial, 1001; query if admissible in civil courts, 1001n
 of accomplice not evidence, 1004
 Admonition, sentence of, 670
 Adulterer, manslaughter of, 1113
 Adverse witness, *see Hostile*
 ADVICE, BY JUDGE ADVOCATE to court on points of law, 466, 469, 636
 to prisoner, 468
 ADVISER, professional, 474-6
 to prisoner, 475; court adjourned to procure, 536; not allowed to address court, 476n, 586n; prisoner in close arrest has right to communicate with, 356; trial adjourned in absence of, 475
 to prosecutor, 476
 to judge advocate, 463n, 467
 not at courts of enquiry, 338
 not permitted to disclose confidence, 930
 Affairs of honour, 226-8
 AFFIRMATIVE must be proved, 829
 sometimes presumed, 830, 878-81
 AFFIRMATION instead of oath, 452
 extended to members, 443
 false, punishable, 453, 907-9
 Africa, court martial in, 304n
 Afterthought of witness, 960
 Agricultural produce, burning, 1214n;
 attempting to burn, 1206; threatening to destroy, 1220

ARM

Aid to civil power, 1100
 ALARMS, creating false, at home, 257n
 intentionally, creating false, 201, 257
 spreading reports calculated to create, 142, 148
 using words tending to create, 142, 152
 ALDERSHOT court martial, *see Crawley*
 arrangement of court, 492
 Alias, prisoner tried under, 390; previous convictions under, 630
 Allen, case of Lieut., 752n, 780
 Allowance, *see Expenses*
 ALTERATION in documents (A.W.87), 142, 215
 or erasure in proceedings forbidden, 482, 578
 Alternative charges, 223, 396, 622, 1202
 AMENABLE to justice, persons who have ceased to belong to service continue, 53; so also prisoners, 70
 to military law, officers on half pay are not, 63
 AMENDMENT of charge, 414
 evidence, 960; minute, 1320
 variances, 847
 Amicus Curie, 466n
 Ammunition, casting away, 169, 257
 Amount embezzled, ascertained by court, 205; recoverable, *ib.*; *see Stoppages*
 Annuity forfeited, 123
 ANSWER, when compelled, 965-7; when not enforced, 438, 961-4; when not allowed, 930-2
 if relevant, may be contradicted, 974, 976; if irrelevant conclusive, 975-6
 ANSWERING, privilege in not, 930
 offence of not, 437, 890
 Apologies dictated, 671
 APPEAL to Reg. Ct. of Enquiry, 341-4;
 from, 343; vexations, *ib.*; not vexatious, 344
 both parties may challenge on trial of, 495n; may give sworn evidence, 914
 to court martial, principle of allowing, 366; punishment for insubordinate, 367
 APPLICATION of articles, 58; for court martial, must be accompanied by statement of circumstances, 384; form of, *ib. n*
 for permission to try by minor court, 263; noted in heading, 265; form, 1290
 Apprehension on charge of desertion, 364; civil offences, 165-7
 Approval, 730. *See Civil Governor, Confirmation*
 Approver, what, 996. *See Accomplices*
 Aqueduct, destroying, 1216n
 Armourer, 65

ARM

Arms, selling or losing, 215, 263; casting away, 201
 what constitutes loaded, 1130
 officer drunk on duty under, 157
 placing in hands of prisoner, 566
 of execution party, 769n
 Army, disclosures as to, 148-150, 215
 law as to standing, 90
 service corps, C.M. in, 310
 Arraignment of prisoner, 550
 Arrangement of court, 492
 Array, challenge of, 496
 ARREST, *civil*, witness protected from, 898; soldiers why, 168
military, authority to impose, 352, 357; to remove, 368; close and open defined, 354
 unnecessarily detaining in, 352
 breaking, 355, 363
 of half pay officer, 61
 of non-commissioned officer, 368
 of schoolmaster, 65
 degrees of, 354; court martial cannot control, 356
 senior officer when liable to, by junior, 147, 357, 435
 witnesses under, examined, 903
 by naval officer, 47
 officer released from, has no right to demand trial, 368
 peers subject to, as other officers, 67-8
 of members of parliament, notified to respective houses, 68n
 of deserters by civil power, 351, 364
 ARSON defined, 1203; attempts at, 1205; statutes, 1207-14
 Art, destroying works of, 1116n
 ARTICLES OF WAR, right of crown to make abroad, 2, 10, 39, 92; limited at home, 2, 38
 continue till revoked, 86
 Indian native army, 58n, 810n
 judicially noticed, 82, 1023
 override royal warrant, 84
 read to troops, 95
penal arranged according to punishments, 110, 141-229; according to competent court, 257-262
 remarks on penal, 144-229
 Artificers, subject to articles, 58
 ARTILLERY C.M. for trial of officers of, 29; an ancient privilege, 29n
 evidence of officers of, 968
 persons hired to be employed in, subject to military law as soldiers, 58
 regimental C.M. when detached, 310
 ASSAULT defined, 1139; aggravated, *ib.*; indecent, 1146
 with intent to rob, 1174; may be found when robbery charged, 1173
 with intent to commit felony, 1139

BRE

ASSEMBLY of court, place changed, 523
 Atheist may be witness, 454, 923
 Attachment, witness subject to, 890
 ATTEMPT found when offence charged, 832
 to cause bodily harm, 1129-39
 to commit rape, &c., 1146; arson, &c., 1206, 1216; murder, 1126-7
 ATTENDANCE OF WITNESSES, civil and military, 890; *military*, 892, 901; prisoners, 903; women, 897
 ATTESTATION, false answer at, 32, 215, 261, 1014
 presumption of due, 872
 how given in evidence, 1014n
 ATTORNEY, *see Adviser, Privilege*
 AUXILIARY FORCES, what, 58n. *See Volunteers*
 trial of, 5, 1351
 Award of commanding officer, when final, 366n

BADGE, forfeiture of, 123, 139
 Bailee, term explained, 1158n; larceny by, 1158
 BC., marking with, abolished, 119n
 Bank-notes, forging, 1222
 Bar of trial, pleas in, 556-68, 1302
 Barrack damages, no appeal before C.M., 342
 Barrister, *see Adviser*
 Beheading for treason, 1071; under Danish military law, 58n
 BELIEF, witness speaks to best of, 956
 subject to penalty of perjury, 956
 Best available evidence produced, 865
 Beverley, Danish troops at, 58n
 Bigamy, 1150
 BILLETS, offence in drawing (A.W.91), 142, 215
 misconduct in (A.W.92), 213, 369
 Birch rod, 1132
 Birth of child, concealing, 1153
 Blake, case of Lieut. James, 57
 BLANK cartridge for execution party, 579n
 returns, signing, 215
 Blowing up buildings, &c., 1215-6
 BOARD on loss of medal, 387
 of enquiry, 330
 Boiling water, injuries by, 1137n
 Bombardier, acting, not awarded reduction, 688
 BOOKS, public, how proved, 1028; how far evidence, 1028
 recommended, list of, 462n
 used to refresh memory, 809
 BOUNTY, recruit deserting, forfeits, 193
 deserter re-enlisting, refunds, 188, 689
 Breach of duty, proved by prosecutor, 830

BRE

"Breach of articles of war, in," an obsolete form, 403
BREAKING and entering buildings, 1183-1193; for plunder, 200
 arrest, 355, 363
 out of hospital, 218
Brevet officers amenable to military law on full or half pay, 59
Bridge, destroying public, 1216n
"Brigade," name, intended for district or garrison court martial, 291n
Brigade-depôt, R.O.M. in, 310
Bristol riots, 1098, 1099
Broad arrow, obliterating, 1087n
Brothel, affray in, 624n
Brotherton, Sir T., anecdote of, 373
Brougham, Lord, on martial law, 100
Broughton, case of Col., 621
BUILDINGS, blowing up, 1125n
 breaking into, 1185-92
 burning, 1209; goods in, 1214
 riotous destruction of, 1217-8
 found in, by night, 1189
Burden of proof, rule as to, 829
Burglary, 1183; proof failing, 834
Burgoyne, case of General John, 64
Burning, *see Arson, Crops, Farm Produce, Ships*
Bushe (C.J.) on lawful command, 594n
CADETS, Woolwich, tried by court martial, 58n
Caffres, how sworn, 448n
Cambridge, Duke of, on recommendation to mercy, 697
Camp followers, 34, 71; in India, 59, 71; during autumn manoeuvres, *ib.* n
Campbell's Act, Lord, 845-8
CANADA, martial law in, 462n
 prisoner released by *Habeas Corpus* in, 396
CAPACITY to commit offence, 1055
 by insane, 587
 by persons under constraint, 593
CAPITAL offences, military, 169, 200
 civil, 1052n
Capitulation, when punishable, 196-9
Captain may confirm district court martial, when, 2, 291, 1271n
Capture of member by enemy, 522, 526
Carnal knowledge, evidence, 1140
Carnally abusing child, 1144-5
CARRIAGES, abusing drivers of, 215
 furious driving of, 1138
Cashiered, "*to be hereby accordingly,*" not to be awarded, 69
CASHIERING, 116; not necessarily awarded for conduct unbecoming an officer, 159; general order to that effect, 839; commuted by Queen, 736; execution of, 788
 mitigated to dismissal, 116

CHA

Casting away arms, 201
Casting vote, president has, when, 456, 574, 619; why, 619; when not, 616, 643
Cat-o'-nine-tails, 762
Cathedral chapter, members of, on military law, 197n
Catholics, oath of Roman, 447
CATTLE, stealing or killing, 1167
 killing or maiming, 1219, 1220
Causes of desertion, 188n, 1014n
CAUTION in admitting circumstantial evidence, 876; confessions, 992-4; accomplices, 917
Cellar, breaking into, 200
Cephalonia, insurgents tried at, 282
Certainty in charge, 405-7
CERTIFICATES of acquittal or conviction, 1012
 of good conduct, *see Character of previous convictions*, when produced, 626-7, 975; on revision, 734; what sufficient evidence, 1013, 1028, 1333n; minute of, 1332-3
 signing in blank, 215
Certified copy when evidence, 1028; not compared in court, 1333n
false, giving, 1030; uttering, 1031
medical, as to prisoner, 535, 672; member, 526
Chains, murderer not hung in, 645n
CHALLENGE proffered to prisoner, 495-514
 peremptory, why not possible, 514
 of president, 497; of members, *ib.*;
 forms of minute, 1292-7
 valid, causes of, 502-12; on appeal, 508
 by crown, 495(7)
 by parties in an appeal, 495n
 to fight duel, 226-8, 835n, 1113
Changing place of imprisonment, 781-4
CHAPLAIN, peremptory punishment, 143; absence of, 215; violence to, 215
 of military prison may recommend remission of sentence, 787
CHARACTER, certificates of (*not evidence*), may be read in defence, 1046; how annexed to proceedings, *ib.*; minute, 1326
 evidence to, produced by prisoner, when, 584, 825; effect of, if bearing on charge, 828; subject to cross-examination, 977; may be rebutted, 825
 general, court enquires into, of *soldier*, 633; who may rebut unfair evidence, 635n, 826; and cross-examine, 635, 826; from whom, 626, 634; minute, 1332
 but not of *officer*, 627n

CHA

CHARACTER, question degrading to, when necessarily answered, 964; by woman, 965; when at option of witness, 968; must be entered on proceedings, 969, 1319
witnesses' credit impeached by, 983; enquiry must be general, *ib.*, 813*n*; except of women alleging rape, 965, 1141*n*
CHARGE, *see Framing, Joint Trial*
general description of, 386-7; vagueness condemned, 380, 457; must be in terms of A.W. to induce special punishment, 406-7
neither preferred unnecessarily, nor delayed, 381
not to include minor irregularities, 397, 398, 400
additional, not entertained after arraignment, 415
signed by, or by order of, convening authority, 494
copy to prisoner, 416; may be altered until arraignment, 385, 414, 418
not altered after arraignment, 414; except, *ib.*, 845-8
objection to, when taken, 568; want of specification may be objected to on arraignment, *ib.*; or reserved for defence, *ib.*; but this course damaging to the character of officers, *ib.*
sufficiency of, question for the consideration of court, 457, 1298
court, taking objection to, adjourns and reports, 458, 551
if not supportable by law, no punishment adjudged, 413
why not read to witness, 952
CHEATING, a misdemeanor, 1200
at play, *criminal charge*, 1200*n*
Cheques, crossed, 1225
CHILD, examined on oath, 922, 1141;
trial not suspended to instruct, *ib.*
leading questions to, 955
indecent assaults on female, 1144-5;
attempts, 1146; evidence, 1144*n*
concealing birth of, 1153
Chloroform, administering, 1133
Choke, attempt to, 1126, 1132
Christian man's oath, 444*n*
Christmas-day, 524
CHURCH, breaking and entering, 1192
maliciously setting fire to, 1208
demolishing, &c., 1217
irreverent behaviour at, 215, 259
Churchyard epitaph, 58*n*
Cintra, Convention of, 334*n*, 339*n*
Circumstances can lie, 875
CIRCUMSTANTIAL evidence, 873-6
variety consistent with truth, 986
CIVIL gaols, committal to, 776

COM

governor approves capital sentence, 712
magistrate refusing assistance to, 165
offences, enlarged definition of, 1050*n*
charge of, subjects to military confinement, 360
tried by court martial, 1050
officer, tried at home, 40*n*
power, aid to, 1100
apprehension of deserters by, 364
CIVILIAN, guilty of contempts, 436-7
offences against, by soldiers, 225, 282
required as witness, 890, 896; expenses of, 905
not to officiate as judge advocate, 463*n*; exception, 462*n*
cannot be prosecutor, 472
Claims at half-yearly inspections, 373
CLASSIFICATION of offences as to punishment, 110
as to competence of tribunal, 257-62
Clearing the court, 454
CLERK, entry of letters by, 1039
embezzlement, &c., by, 1198
Client, privilege of, as to professional confidence, 930
Close arrest, 355
CLOTHING, complaint as to; 341 false return as to (A.W.88), 142, 162, 215;
making away with (A.W.102), 215
Co-defendant, competent witness for defence, 915; but not when arraigned together, 918-9; whether for prosecution, 916
Co-conspirators, evidence against, 820-4, 864
COIN, offences relative to, 1077
counterfeit, what, 1085
current, what, 1077*n*
foreign, 1077*n*
possession, what, 1085
COLLATERAL facts, evidence of, 814-6;
to prove intent, 815
COLONIES, documentary evidence, how authenticated in, 1029; including India, 1029*n*
having foreign laws, trial of soldiers in, 76; martial law in, 102-6
Colonial and regular officers, association of, on court martial, 23
Colour-serjeants not sentenced to be reduced to platoon serjeants, 127*n*
COMMAND of army by sovereign, 81
lawful, signification of, 595; disobeying, 178, 257, 596
COMMANDER-IN-CHIEF must attend as witness, 893-5
disrespect to (A.W.41), 215
may commute death, 737
COMMANDING OFFICER, how tried, 20
when objectionable as member, 510
appeal against award of, 366-7

COM

COMMANDING OFFICER, redress of wrongs by, 367, 375
 Commencement of sentence, penal servitude, 647, 772; imprisonment, 686
 Commission, *see Court Martial*
 Commissariat officers, liable to court martial duty, 12
 Commons, House of, witness before, 1001; members of, 67
 Communications, privileged, 930-3, 894
 COMMUTATION by crown only by enactment, 735
 of cashiering, 736
 corporal punishment, 740
 power of, by commanding officer, in no other case, 735
 death to penal servitude by confirming authority, 737
 penal servitude, 730
 Comparison of hand-writing, 1042
 Compassing the Queen's death, 1067 to levy war, 1076
 Competency, *see Incompetency*
 Complaint, *immediate*, confirms evidence of injury, 862; *delayed*, raises presumption against, 1141
 COMPLAINTS of soldiers, 341; at inspection, 372; jealousy as to interference with, *ib.*
 COMPOSITION of general C.M., 271; for trial of officers, 18-20
 district C.M., 290; for trial of warrant officers, 304
 regimental C.M., 310
 Compound larceny, 1159*n*
 Compulsion, inevitable, what, 594-7
 wife acting under, of husband, 1060
 Comrade, stealing from, 222
 CONCEALMENT of birth, 1153
 of evidence, effect of, 866
 Concert, trial of offences in, 402, 620
 Concurrent jurisdiction, 32, 224
 Condonation of offence, 565-6, 216*n*
 CONDUCT, *see Disgraceful, Scandalous, Good*
 CONFEDERATE, *see Accomplices*
 evidence against, 821-3, 864, 1004
 CONFESSION, not evidence against others, 822, 1004; whole statement to be received, 1003; must be voluntary, 995; sworn to by two witnesses, when, 993*n*
 when excluded, 996
 before court of enquiry, 1001
 obtained when drunk, 997; by deceit, 998; in answer to questions, 997; by religious inducements, *ib.*
 of desertion, before magistrate, not conclusive, 1014*n*; to commanding officer, 216; evidence of, 1016
 CONFIDENTIAL communications, 930-3; *see Privileged, Report.*

COR

CONFINEMENT, 352; *see Solitary, Escape* of soldiers on minor charges, 358
 CONFIRMATION of sentence, 710
 by sovereign, 711; channel of receiving, 717
 on warrant officers, 305
 minute on proceedings, 720, 1344
 of witness, 980, 981
 CONFLICT OF LAWS, rule in case of, 84
 precaution against, 84; in India, 810*n*
 Confronting witnesses, 944
 Consideration to feelings of soldiers, 759*n*
 Consent of parties cannot affect constitution of court, 528; may influence the reception of evidence, *ib.*
 CONSPIRACY, evidence of, 820
 to murder, 1124
 to mutiny, 170
 Construction of writings, 1044-5
 Constructive breaking (into house), 1185
 presence, 1067; taking, 1198
 CONTEMPTS, by military persons, 434
 senior to president of court, 435
 by civilians, 436
 constructive, not punishable summarily, 434
 CONTRADICTION of witness, 970, 976-8
 of own witness, 985
 Contradictory statement, witness called on to reconcile, 678, 960, 971
 Control department, 59
 CONVICTIONS, PREVIOUS, *see Certificates*
 notice of, not required, 419; when advisable, *ib.*
 against officer, 627
 evidence as to, received, when, 626;
 from officer, 626; not adjutant, 634; at improper time, 725; on revision, 724
 minute of, 1322
 evidence, what sufficient, 629; effect of, 628
 cross-examination as to, 979
 admissible to rebut evidence of good character, 825
 Convicts, military, not sent home without order of committal, 770*n*
 COPIES, when admissible as secondary evidence, 1037
 made by authorized officer, equivalent to original, 1028
 of private writings, how authenticated, 1038
 of documents, sufficient to annex to proceedings, 1046
 Copper money includes bronze, 1077*n*
 COPY of proceedings, how obtained, 489
 of charge to prisoner, 416
 certified, when evidence, 1113, 1115-6, 1028-9, 1039; when not, 1039
 CORPORAL PUNISHMENT, used only of flogging, 761*n*; when only to be re-

COR

sorted to, 119; not to exceed *fifty* lashes, 119; but imprisonment may be added, 674
 sentence of, 673; not to warrant officers, 304
 execution of, 762; not on Sunday, 766; after escape, 667; in prison, 769
 cautions before ordering, 768
 irregular infliction, 762
 second infliction of, illegal, 765
 commuted, 733, 740, 769
CORRECTION of evidence by witness, 960; subject to cross-examination, *ib.*; when suspicious, 960ⁿ; form, 1320
of proceedings, by addition, not erasure, 482, 578, 960; suggested by member, 482; by witness, 960; form, 1320
CORRESPONDENCE with enemy, 169, 194
 caution as to, in field, 150
 Corroboration of accomplice, 917
 Corrosive fluid, 1137
COUNCIL of war, objections to, 197
defence in French service, 197; adopted by Duke of Wellington, 194ⁿ
 Counsel, *see* *Adviser*
 Counterfeit coin, 1085; passing, 1079-83
 Court, how arranged, 492
COURT of ENQUIRY, when resorted to, 365; how constituted, 331; how composed, 339; how protected, 1366
 whether preferable to C.M., 217
 in volunteer force, 349
 Duke of Wellington on, 333ⁿ
 duties undefined, 333; except, 340-9
 has no power to administer an oath, 334; except, 332, 348
held under articles of war, 341; statute, 349
 compulsion of witnesses to attend, arises only from the order of superior authority, 334
 investigation by, whether limited as to date of transactions, 340
 may sit with closed doors, 337
 the person whose conduct is the subject of enquiry may refuse to answer questions put by, produce documents, or to take part in proceedings of, 335-6; should be cautioned not to criminate himself, 335ⁿ; has right to be present, 337
 for redress of wrongs, 341
 on maimed or injured soldier, 345
 to record illegal absence, 347
 on prisoners of war, 348
proceedings of, reduced to writing, 339; attested by signature of all

COW

members, *ib.*, not produced without consent of Crown, 331; or superior military authority, 1007; not evidence of facts detailed therein, 1021; except of absence without leave, 347, 1015; evidence of statements, 1021
admission before, not evidence before court martial, 1001
members of, ineligible for subsequent court martial, 512
COURT MARTIAL act, 11
 book, 488, 347ⁿ; officers, 627ⁿ; evidence, 620
 commission, recommendation of, 127ⁿ, 205, 417ⁿ; evidence before, 461ⁿ, 462ⁿ, 463ⁿ, 970ⁿ
COURTS, common law, supremacy of, 32, 73; foreign acts of, how proved, 1029
 of law, concurrent jurisdiction, 32, 222
COURTS MARTIAL, *see* *Warrants, General, District, Naval, Regimental, Composition, Jurisdiction, Powers, Proceedings, Sentence, Revision*
 origin of name, 1ⁿ
 Her Majesty constitutes, 2; as may officers in certain cases, 3, 4, 284
 for trial of marines, 22, 441; native troops in India, 6; when Indian evidence act applies, 810ⁿ
 the creature of the legislature, 810
 authority limited within realm, 10
 for purposes of enquiry, 31, 317
 in certain cases, supply place of common law courts, 74, 1050
 form of application for, 384ⁿ
convened by warrant, 2, 6; authority of articles of war, 3, 310; virtue of mutiny act, 4, 278
composition of, 12; association of services on, 22-4
 application for, 384; officers cannot demand, 368
 arrangement of, 492
assembly, 490; order for, 426; hour of, 524
 open to public, 454; clearing, *ib.*
 books laid before, 490, 462ⁿ
 swearing in, 440, 520; resworn on each trial, 521; affirmation, 443
 may repress contempts, 434, 437
 adjourn by order of president, 525
 deliberate with closed doors, 454
 to examine charge, 457, 551, 1298
 may question witnesses, 577, 1330
 how far to assist prisoner, 977ⁿ
 whether originate evidence, 948
remark on conduct of prosecutor, 701; on conduct of witness, 706; on charges and their origin, 703; on

COV

points connected with discipline, 706; animadversion should be precise, not general, 708; not actionable, 707; in separate letter, 700
 officer cannot insist on, 368
 cannot be held on board ships of war, 42, 48
 held for enquiry, 31, 310
 cannot be interfered with by the highest military authority, 459; except as to sentence of solitary confinement, 83, 681; but proceedings may be suspended in Indian forces, 522
 exist till dissolved, 522
 when dissolved without passing judgment, 527
 reduced below legal number, 526
 under martial law, 23, 104, 282, 441
 Covering letter, 486*n*, 1350
 Cowardice, 195
 Crawley, Lt.-Col., incident on trial of, 426, 459*n*, 480*n*, 492, 571, 572, 574, 971, 980, 1018
 CREDIBILITY OF WITNESS, *see Incompetency*
objection to, raised when, 910; not by party calling him, 983; but contrary proof admissible, 985
impeached by, cross-examination, 955, 963-8, 971-7, 979; *not* by proofs of particular acts, 975, 980; *but* of general character, *ib.*; which may be rebutted, *ib.*
proof of contrary statement, 981-2; in some matter relevant to charge, 975; and, if in writing, first shown to the witness, 976
proof of bad motives, &c., 974
 Credit, crying down, 144-5
 CRIME, written, 360; *see Offences, Charge*
 infamous, what, 1178*n*.
 CRIMES, definition of military, 110; arrangement of, *ib.*
 not capital, 205-229; (A.W.105) 215
 CRIMINAL CHARGES, not joined with military, 401; why here referred to, 1054
 CRIMINAL OFFENCES, *soldiers* tried by courts martial for, when not applied for by civil magistrate, 165-7, 222
officers and soldiers tried for, to the exclusion of civil judicature, 33, 34, 77, 1050
 Criminate himself, no man bound to, 335, 961; except before native C.M. in India, 810*n*
 but questions to that effect may be put, 968
 how far court bound to caution witness, 969*n*
 Crops, burning, 1214(3)

DEA

attempts to burn, 1206
 CROSS-EXAMINATION, 971-7
 prisoner may defer, 577, 584, 953
 not restricted in, 970, 1309
 improper interference with upsets trial, 576, 970
 rule as to writings, 976
 as to collateral facts, 815, 975
 as to previous statements, 977; if in writing, 978
 as to previous convictions, 979
 of woman ravished, 965
 leading questions allowed on, 970, 971
 as to motives, &c., of witness, 955, 974; to test the veracity of, 975-9
 Crossing of cheque, altering, 1225
 Cross-reference in minutes, 1046*n*
 CROWN, command of army, 81
power of to make articles, 2, 10, 39, 72
 exclusive to pardon, 731
 none to commute except by law, 735*n*
 CRUELTY, punishment of, 225, 1219
 in execution of sentence, 762
 Crying down credit, 144-5
 CULLEN, case of Ensign, 21*n*, 535, 915
 examined for co-defendant, 915
 CUMULATIVE punishments, 687
 sentences on expiration of previous, 647, 686
 Cunningham, case of Paymaster, 571*n*, 607
 Current coin, defined, 1077*n*.
 Curtilage, buildings in, 1190
 CUSTOM OF WAR defined, 80, 581*n*
 how originating, *page ix*. 82
 referred to in member's oath, 440
 will justify deviations from precedents of civil courts, 581*n*; but not in respect of evidence, 1005
 D, MARKING with letter, abolished, 119*n*
 Damages, &c., assessed by court, 205, 689; apportioned to several prisoners, 402. *See Stoppages*
 Danish corps in England, 58*n*
 DATE, president's signature to sentence, 692; form, 1341
 variances in, 849-51
 Dawkins, case of Lt. Col., 332, 1353
 Deaf and dumb witness, 950
 Dean Sutcliffe on military law, 1(3), 197
 DEATH, SENTENCE OF, 616
 two-thirds must concur in, 616*n*
 wording of, 645
 military offences punishable by, at home, 169; in foreign parts, 200; in reign of James II., 169*n*
 civil offences punishable by, 1052*n*
 not peremptory in any case, 38*n*; military, 114, 118; or civil, 1052

DEA

DEATH, to be proved by civil governor, 712-3; may be referred to Queen, 716, 1254; from India, 1259
 commutation of, by Queen, &c., 729
 execution, 759; warrant for, *ib.n*
Death, knowledge of impending, supplies place of oath, 860
Debt, soldier taken out of service for, 168
Deceased persons, dying declaration of, 860; documents in hand-writing of, 1039
DECISION of incidental questions, 456
 when votes equally divided, 619
 as to sentence by absolute majority, 616; not according to private knowledge of member, 947
 in capital cases by two-thirds, 616(4)
DECLARATIONS, dying, when evidence, 859
 of confederates, when evidence, 864
 on attestation, when evidence, 1014
 in lieu of oath, 452
Decorations, forfeiture of, 117; by officer, 117
Decorum, offences against, cognizable as military offences, 158, 841-2
DEFAULTER BOOK, *evidence*, on charge of drunkenness, 214, 1334
 sufficient evidence of previous convictions, 629, 1013, 1332
Defects, cured by finding, 850-5
DEFENCE, 583-9, 598, 604-5; special justification, 589-97
 evidence for prosecution not received after prosecution closed, and prisoner on his, 600, 602, 948
 time to prepare, 583, 605, 1322, 1326
 matter not to be expunged by court, 725; nor prisoner restricted in, *ib.*
see Address of Prisoner
Defiling women and girls, 1142-6
DEFINITION of military crime, 110
 of evidence, 808
Defraud, *see Diagracious Conduct*
a particular person, when not necessary to prove intent to, 1221
DEGRADATION, non-commissioned officer, to lower rank, 126n
 process of, 792n, *see Discharge*
Degrading question, *see Character*
Delaying trial, 350, 382
DELIBERATION takes place with closed doors, 454
 as to punishment in certain cases, superseded by prescribed poremporary punishments, 636
DEMANDING with menaces, 1172, 1177
 by letter, 1176, 1178
Demerara court martial, 23n
DEPOSITIONS, not received at C.M., 1020; Duke of Wellington desirous of, *ib.n*

DET

DEPOSITIONS, on former trials how used, 528, 1019
Deputation of court cannot receive evidence, 530; *query* as to view of place, 429
DESCRIPTION, variances in, 389, 847
 return of deserter, 188n; made evidence, 1014; admits of improvement, 189n, 1014n
Desert, inducing soldiers to, 1089
DESETERS may be transferred, 187;
 before conviction, 193n
 apprehension of suspected, 351, 364
 misapplication of term, 359n, 1014n;
 preferable description, 351
DESSERTION, *see Absence, Confession*, defined, 179; time not criterion, 182;
 nor distance, 183
 includes absence without leave, 182n;
 which may be found if the more grave offence not proved, 184, 837
 not triable by regl. C.M., 263, 313
 charged and absence found, 184, 837; minute, 1331
 a prisoner may be arraigned for several acts of, at once, 181, 401; but not several prisoners for simple desertion, 402n.
evidence, collateral, of intention to commit, 816; unexplained absence, presumptive of, 878
 proceedings of Court of Enquiry are evidence, 348
 proved by fraudulent enlistment, 181
 witness may not characterise absence as, 957n
sentence, death, &c., 169; forfeitures incidental to, 185
 stoppage to make good bounty obtained by, 188, 689
Design, evidence of, 879, 1204, 1221
DESTROYING or damaging stores, 200, 1087; necessities, &c., stoppages how awarded, 689
 buildings, &c., 1215-8
 malicious, punishable by A.W., 1207
 destructive substance, sending, 1137;
 administering, 1125
 attempt to administer, 1126
DETACHMENTS, OFFICERS COMMANDING of ordnance corps may hold regl. C.M., 310
 not under rank of captain, may hold detachment C.M., 319; or on line of march, &c., of any rank, *ib.*
Detachment C.M., and regimental, distinction between, 323
DETACHMENT-GENERAL COURT MARTIAL, 278; held *only* on complaint of inhabitant, 279, 285; have powers of general court martial, 280
 confirmation, special proviso, 284

DET

DETACHMENT-GENERAL COURT MARTIAL, constitution, peculiarity in, 4, 283
 available under martial law, 282
 Detail of members, 12, 18-21, 427
 Detaining supplies, 154
 De Vere, murder of Major, 1122a
 Direct and circumstantial evidence, 873
 Disapproval of sentence, 721, 730
DISCHARGE with ignominy, 126; sentence, form of, 1340; how carried into effect, 792-5; forfeitures consequent on, 139
 soldiers entitled to, trial of, 254
 of men sentenced to penal servitude, 773
 Discipline Act, position of soldier changed by Naval, 43-51
 Disclosures, making improper, 149
 Discrediting own witness, 986
 Discrepancy between orders, 84
DISCRETION OF COURT as to charge, 457, 551; evidence, 619
 superior as to trial, 368, 384; charge, 414; sentence, 709, 711
 Discretionary punishments, 111; applicable to officers, 144-7; to warrant officers and non-commissioned officers, 126-131; to soldiers, 118-125
 Disease, feigning (A.W. 51), 215
DISGRACEFUL CONDUCT, offences charged as, 217; indiscriminate use of term in charge to be avoided, 217n, 225; facts to be clearly set forth, 413
 imputation may be thrown out and offender punished, 843
 includes felonies, 224
 Disguise, using at night, 1193
 Disjunctive, charge not in, 396
 Dismissal, sentence of, 115; less severe than cashiering, 116
DISOBEDIENCE of lawful command, 178, 595
 garrison orders, 178, 262
 Disorders, quelling, 147, 215
 Disputes enquired into by Regimental Court Martial, 317
 Disrespect, charge must specify particulars, 409; in absence of third person, 869; collateral evidence of, 818
DISRESPECTFUL WORDS, proof of, 833
 against Royal Family, 142, 215
 Dissolution of court, 526, 527, 535
 Distinctive jurisdiction, 252; *see Jurisdiction*
 Distinct punishments, not awarded, 687; unless expressly authorised, *ib.*
DISTRICT COURT MARTIAL, convened by officers authorized by warrant, 291
 constitution of, 3, 291; composition, 292-3

DYI

DISTRICT COURT MARTIAL, duties of president, 294, 430-1
 offences, cognisable by, 259-63
 general officer may extend jurisdiction of, 263
 punishments applicable by, 295-9
 confirmation of sentence of, 302
 transmission of proceedings, 303
for trial of warrant officer, proviso as to members, 292, 304
 Disturbing proceedings of C.M., 215, 434
 Divine service, misconduct at, 215, 259
DOCUMENTS, *see Writings*
 by whom read to court, 573, 1137
 notice to produce, 890, 899, 1035
 originals when annexed to proceedings, 1046
 tendering false, 1031
 Douglas, case of Capt. A., 351a
 Drawing and quartering, 1071
 Dress of officers at C.M., 491
 Driving, furious, 1138
 Drown, attempt to murder, 1126
DRUG, administering feloniously, 1125-6, 1133; to aggrrieve or annoy, 1135
 intoxication from, 157
 Drum-head court martial, 251
 Drumming out, 792
DRUNK, *not on duty*, distinctive jurisdiction, 213
 under arms, 157
 witness if, examined when sober, 920
DRUNKENNESS, habitual, 211
 fine for, 211-3
 simple act, not separate charge, 400
 no palliation of offence, 591
 from effects of opium, 157
Duces tecum, 890, 1288
DUEL, *criminal charge*, all parties principals, 1113; fatal, 835
 articles on, 226-8
 Danish trooper beheaded for, 58a
 Dumb witness, 950
 Dunkin, case of Lieut., 842
 Duration of mutiny act, 85, 94
DUTCH articles of war, 1a
 regiments in England, 58a
DUTY, refusing to assist officer in execution of (A.W. 68), 123
 drunk on, 157, 213; what is, 213
 court martial taken by roster, 21
 tour of court sworn counts as, 538
 hiring to do (A.W. 101), 215
 neglect of, not presumed, 830
 Dwelling-house, definition of, for the purposes of house-breaking and burglary, 1187; found in at night with felonious intent, 1189
DYING DECLARATIONS, 859
 of wife against husband, 926
 in favour of prisoner, 860

EAS

EAST INDIA COMPANY, *see Indian*. Mutiny act repealed, 58n
 Electric telegraph, 1216
 Elephants, false muster of, 143n
 Embarked in Queen's ships, regulations for troops when, 43
EMBEZZLEMENT, what, 1197; of stores, &c., by persons in charge, 205
 by non-commissioned officer or soldier, 207
 of military stores (a civil offence), 1087
 in clerk or servant, 1198
 by civil servants or police, 1198n
 charged, larceny found, 1197n
ENEMY, Queen's, who, 1070
 abandoning post to, 196
 falling into hands of (A.W. 65), 142, 215
 relieving, not expressly noticed in mutiny act, 194
 misbehaving before, not synonymous with cowardice, 195
 improper communications with, (A.W.51), 194; (A.W.59), 142
Engineers, persons hired to be employed under, subject to mutiny act, 58
England, when soldier cannot claim trial by law of, 79
English law referred to on trials for civil offences, 75, 98, 1050-4
Enquiry, courts martial for purposes of, 31, 317n; *see Court of Enquiry*
Enrolled pensioner, 58n
Entering house in night, 1189
ENTRIES, making false, 142, 215
 refreshing memory by, 959
Equality of votes, *see Votes*
ERASURES in proceedings not allowed, 482, 578
 wilfully making (A.W.87), 142, 215
ERRORS in proceedings, corrected, 482, 578, 960, 1320
ESCAPE, prisoner effecting, 363; cannot be re-committed for equivalent period of imprisonment, 784; subject to immediate infliction of previous sentence of corporal punishment, 767
 aiding to, 1060; preventing, 1107
Etymology, false, of "Court martial," 1n
EVIDENCE, *see Hearsay, Presumptive, Rules, Secondary, Writings, Witness, Perjury, Character*
 definition of, 808
 admissibility of, question for court, 574; president has casting vote, 456, 619; judge advocate points out deviation from law, 466, 469; minute of decision, 969, 1317, 1319
 questionable, admitted, or rejected,

FAL

 may be brought to the notice of confirming authority, 619n
 can court originate, 948
 tested by cross-examination, 971
 laws of, same at C.M. as in English courts of common law, 811, 1006
 on former trial, how taken on fresh trial, 528
 of previous convictions, *see Convictions*
 all to be recorded, 573, 576
 read to witness, 578, 960
 weighing, 611, 986
EXAMINATION, *see Cross- and Re-examination*
 of witnesses, order of, 577, 581, 953
 separate, 943; but witness present is not incompetent, *ib.*
 in open court, 573, 940; at bedside of sick or disabled witness, 941
 of natives in India, 941
 by question and answer, 480, 954; except prosecutor's, 571n
 leading questions not allowed, 970; but suggestive to assist memory, or introductory, *ib.*
 prevaricating under, 439
 refreshing memory under, 959
 as to best of belief, 956
 as to opinion, when allowed, 957; of medical man as to sanity, 957n
 of witnesses confronted, 944
Excess of jurisdiction, 435n
Exciting to mutiny, 1089
Excusable homicide, not punishable, 1111
EXECUTION of office, *see Office*
 of sentence, 757-807, 1107; for treason, 1071
 party, how detailed, 759n
Expenses of witnesses, 904-6; tender of, when necessary, 891
Experts, evidence of, 957, 958, 1042
Explosive substances, injury to person, 1136; to property, 1216
Extension of jurisdiction by superior, 263; provided he is authorized to convene the superior court, 264, 380
Extorting by threats, 1172, 1177; by threatening letters, 1176, 1178
Extracts, when not received, 1033, 1036; why not, 1004n
Eyes, tampering with, 259

FAIR copy of proceedings prepared day by day, 479, 610
Fair play, forms at C.M. intended to promote, 550
FALS accounts, 163; alarms, 152, 257n, 262n; certificates, 163, 1030; returns, &c., 162; musters, 142

FAL

FALSE answers by recruits, 261
 pretences, obtaining by, 1200
 confession of desertion, 216
 reports in action, 148
Farm buildings, burning, &c., 1214
Feigning disease (A.W.81), 215
Felo de se, 1112*n*
FELONY, definition, 1073
 admittedly unpractical, 1073*n*
 homicide for prevention of, 1100,
 1107
 assaults with intent to commit, 1139
 disguised to commit, 1193
 tried in civil court causes military
 forfeitures, 139; but no longer
 civil, 1073*n*
 cognizable by C.M. at home, 222
Fenian trials, precedents at, 426, 497(10),
 916
FIELD OFFICERS, courts for trial of, 18,
 272
 an officer below, cannot be deputed
 to convene general or district
 courts martial, 2, 1253, 1257; ex-
 cept, 1271*n*
Figures, as well as words in sentence,
 388*n*, 1337
FINDING of court, 610-25
 may be special, on each part of
 charge, 621; or with reference to
 variance in proof, 847-55
 must extend to each part, 622
 separate when allowed, 918-9
 should be precise, 623
 revision of, *see Revision*
FINX for embezzlement, 206
 drunkenness, 211; how disposed of,
 212*n*
 by commanding officer, 212*n*; scale,
 ib.; appeal against, *ib.*
Firing at, with intent, 1126, 1130
Fitzgerald, Lieut., refusal to plead be-
 fore naval court martial, 51*n*;
 supported by Duke of York, 51*n*
Fixtures, stealing, 1199
Followers of the camp, 71-2, 76; in
 India, 71, 59*n*; at autumn manœu-
 vres, 59*n*
Foot Guards, trial of, 26
FORCING safeguard, 204; sentry, *ib.*
 seamen ashore, 1105*n*
FOREIGN coin, 1077*n*; passing, 1081;
 counterfeiting, 1082
 corps in Her Majesty's service, 58,
 478
 enlistment act (1870), 1086
 orders, accepting, 1086*n*
 states, serving, 1086
Forfeited service, restoration of, 791
FORFEITURE of hundred pounds, 141
 of *good conduct pay*, by sentence of
 court martial, 123; consequent on

GAZ

conviction, 139; case of reduced
 non-commissioned officers, 128
of pay and service, 790; during im-
 prisonment, &c., 135; during il-
 legal absence, consequent on con-
 viction, 136
of past service, consequent on con-
 viction of desertion or felony, 139
of past and future, may be awarded
 by general or district C.M. for any
 offence, 123; how remitted, 742;
 how restored, 791
 of prize money, 137
 of money in savings bank, 138
 for treason and felony abolished,
 1073*n*
FORGED evidence, uttering, 1031
 pass, 1221*n*
Forgery, 1221-4
FORMER trial bars second, 560
 evidence at, when admissible, 528;
 on trial for perjury, &c., 1018
FORMS of warrants, &c., 1250-1286
 of oath, 440, 477
 of application for, C.M., 384(5)
 of charge, models, 223, 397
 manslaughter, 1115*n*; murder, 1116*n*
Fortress, surrender of, 196
FRAMING CHARGES, 386-414; *see Charges*
 in disjunctive, 369, 1202
 including distinct offences, 401
 of serious nature ought not to include
 offences which are summarily pun-
 ishable, 397-8
 irregular, when nevertheless sufficient
 for conviction, 406
 must follow article, &c., to induce a
 special punishment, 405-7
FRAUDULENT, *see Confession, Disgraceful*
 enlistment, 181, 188
 misapplication, *see Embezzlement*
Frays, disobeying orders in, 147
French military law, 198, 711*n*, 759*n*
Friend, prisoner allowed assistance of,
 474; if not witness, 942; but per-
 mission may be revoked, 474;
 allowed to read address if not pro-
 fessional adviser, 586; *see Adviser*
Frye, case of Lieut., 749, 459*n*
Furious driving, 1138
FURLOUGH, desertion off, 180
 wrongful extension of, 262

G**AOLES**, imprisonment of soldiers in,
 776
 Garrison orders, disobeying, 178, 215
 Garotting, 1132; whipping for, *ib.*
 Garrison C.M., *see District*
 Gavin, case of Wolton v. Major, 360
 Gazette, evidence of promotions, &c.,
 1024

GEN

GENERAL COURT MARTIAL, 270-7, 343*n*;
composition of, 18-20, 271-4
punishments applicable by, 113-132
reduced below the legal number, 526
for trial of civil crimes, 1050; how
convened, 1051; must refer to
English law, 1052-3; except in
India, 1052*n*; power to commute
death, 1052; *see Court Martial*
General officers, how tried, 19
German legion, 58*n*
Gestures, menacing, 434; provoking,
215, 227
Gibbs, case of Capt., 840
Gibraltar, trial of civil offences at, 1050
Girls, abusing, 1144-5; *see Abduction*
Good conduct pay, forfeiture of, 123,
140
Good Friday, 524
Grant, case of Serjt., 65
Gross insubordination, 268
GUARD, commander of, to receive pri-
soners, 360; and report, 361
leaving, (A.W.65), 142, 199, 213
GUARDS, life and horse, how tried, 25;
when detached, 28
officers of foot, how tried, 26; when
other corps are interested, 27
GUILTY, plea of, though recorded, evi-
dence to be proceeded with, 553
prisoner pleading, may cross-examine
and adduce evidence as to fact and
character, 554; legal effect of, 1005
Gunpowder, *see Explosive*
Gustavus Adolphus, articles of, 1*n*

HABEAS CORPUS, for bringing up
prisoner, 68; witness, 903
on application of prisoner, 751
Habitual drunkenness, 211
HALF-PAY OFFICERS, whether within
terms of mutiny act, 60-3; not
amenable to military law, 62
amenable to justice for offences when
in actual service, 67
Half-yearly (*now annual*) inspection,
complaints at, 373
Hallilay, case of Capt., 562
Handwriting, how proved, 1041
Hanoverian regiments, 58*n*
HARD LABOUR, 672, 680; when modified
sentence awarded, 684
now applicable to officers, 115
Heady, case of Quarter-master, 617
HEARSAY, what, 857; not evidence, 856;
except words or writings considered
as acts, &c., 858, 861; expressions,
subject of charge, 858; complaint
of recent injury, 862; declarations
of associates, 864; dying declara-
tions, 869

IGN

HEARSAY, to impeach credit of witness,
981
conversation of prisoner, 861; of
third person, when admissible,
864
Heiress, abduction of, 1147
Henry VIII., his articles, 29*n*
Hessian regiments, 58*n*
Highway robbery, 1171; *see Robbery*
Hindus, oaths of, 447
Hiring substitute to do duty, 215
Home, case of Col., 331
HOMICIDE, justifiable, 1107; excusable,
1109; felonious, 1112; *see Murder*
Jurisdiction in, Act, 1122*n*
malice presumed from, unless re-
butted, 880, 1121
Honorary rank, 15
HONOUR, affairs of, 226-8
sense of, in all ranks, 624*n*
Honourable acquittal, not entered on
proceedings, 625; nor expressed
in case of soldiers, *ib.*; the Duke
of Wellington hereon, *ib.*
HORSE, stealing, 1167; maiming, 1219;
ill-using, making away with, 215,
262
Guards, trials in, 25
HOSPITAL, rules, breach of, 218
time in, counts for sentence, 783
apprentice, punishment of, 131
Hostile witness, contradicting, 985
leading questions to, 955
HOUR of courts' assembly, 524; noted,
525
of adjournment, 525; noted, 525;
may be extended, 524
when stated in charge, 394
Houghing cattle, &c., 1219
HOUSE breaking, in the night, *see Bur-
glary*; what amounts to, 1185;
possession of tools for, 1193
burning, see Arson
demolishing, 1217
Hull, Danish corps landing at, 58*n*
HUSBAND, being prosecutor, wife may
give evidence, 927
coercion of, excuses wife, 1060
and wife incompetent to give evi-
dence for or against each other,
926; *except* on a criminal assault
on the person of either, 926
Hyder, case of Lieut., 704*n*, 1034

IDENTIFICATION of prisoner, 390;
passing under different names, 630
by accomplice requires confirmation,
917
Idiot, incompetent witness, 920; how
far capable of crime, 587
Ignominy, *see Discharge*

IGN

Ignorance, no excuse, 593
 Illegality of second trial, 726
 Illness of prisoner, 535; prosecutor, 537;
 witness, 941; member, 526
 Ill-treating landlords, 215, 367; sol-
 diers, 215
 Impartiality of witness, how impeached,
 976
 Impeding provost-marshal, 156
 IMPRISONMENT, 674-686, 774-786; ex-
 tent by general and district C.M.,
 297, 680; by regimental C.M.,
 314, 680; sentence expressed in
 days, 685; modified, 684; of of-
 fenders under sentence, 686; word-
 ing of mixed, 1338, *g.A.*
 in civil prisons, when, 776
 period how calculated, 686, 779
 of offenders under sentence, 686
 place not appointed by court, 686,
 774; may be changed, 780-4
 caution in observing the due for-
 malities, 780ⁿ, 781
 when to commence, 686
 remission of, 785; in military pri-
 sons, 789
 time in hospital, reckoned, 783
 soldier sentenced to, forfeits pay and
 service, 135
 see Hard Labour, Prison, Solitary
 Incapacity to serve, not awarded, 668;
 but unfitness may be declared, 56,
 668
 Inciting to mutiny, 1089
 INCOMPETENCY OF WITNESS, 910
 objection when raised, 910
 does not arise from infamy or in-
 terest, or conviction of desertion, 912
 from infancy, insanity, &c., 920
 from marriage with prisoner, 913,
 925; statute, 913; but not from
 cohabiting with, 928
 from being collectively charged for
 the same crime, 918; such evi-
 dence, if important, may be ob-
 tained, 918-9; persons separately
 arraigned not incompetent, 916;
 see Credibility
 Inconsistency of evidence, 984; witness
 required to reconcile, 971
 INDECENT conduct, *see Disgraceful*
 assault on male, 1156; on female, 1146
 Independence of C.M., 459; not to be
 weakened, 746
 INDIA, powers of commander-in-chief
 in, 711; warrant to, 1256
 evidence wrongly rejected in, 970
 modification of English law in, 1052;
 but not as to evidence before C.M.,
 810; why objectionable, 810ⁿ
 INDIA, C.M. assembled under *any* war-
 rant in, 11; followers, male and

INT

female, tried by, 71; oaths before,
 447
 irregular appointment of judge
 advocates, 1261ⁿ
 officers imprisoned in, 135ⁿ; cashiered
 in, 788ⁿ
 tampering with secrecy in, 471ⁿ
 trial of criminal offences by C.M. in,
 1052; according to Indian penal
 code, 1052ⁿ
 witnesses, privileges of native in, 941
 INDIAN Army subject to M.A., 59; ex-
 cept natives, 6
 forces, suspension of trials in, 522;
 whence, *ib.n*
 native troops, trials in, 6, 810ⁿ
 evidence act, does not extend to statu-
 tory C.M., *page v*, 84ⁿ, 810ⁿ
 penal code, 1052ⁿ
 staff corps, 115
 Indictment, *see Charge*
 Inducement invalidates confession, 995
 INFAMOUS CRIME, defined, 1178ⁿ
 threats to accuse of, 1178-9
 INFANT, when admissible as witness, 922
 defiling female, 1143-6
 male, punishable for rape, 1141;
 sodomy, 1155
 Inferior court, extending powers of,
 263-7
 Infernal machine, 1127
 INFIDEL, *atheist*, examined on declara-
 tion, 453, 923
 deist or *heathen*, examined on oath,
 444-5, 447, 450, 923
 Infiction of sentence, commanding
 officer responsible for due, 763
 Inform, sense in which used, 472ⁿ
 Information, publishing unauthorized,
 148-150
 Informer, *see Accomplices*
 INJURIES, malicious, to property, 215,
 262, 1207; to self, 219; to other
 soldier, 221; or other person, 1131
 inflicting grievous bodily, 1129
 Innocence, presumption of, 877
 INSANITY of prisoner, 590; questions to
 medical witness, 957ⁿ
 of witness, 921
 INSPECTION, annual (*formerly half-*
 yearly), report, 756; complaints at,
 373
 of place, &c., by court, 523, 809
 Insubordinate language, 172, 395, 409
 Insubordination, 215ⁿ; extended juris-
 diction to repress, 268
 INTENT, how proved, 879-881; in bur-
 glary, 1183ⁿ
 to defraud or injure any particular
 person not necessary to arson,
 1204; forgery, 1221; false pre-
 tences, &c., 1200ⁿ

INT

- how stated in charge, 407
- INTENTION characterises desertion, 179
- of stealing, necessary to larceny, 1162
- presumption as to, 879
- Interest does not render witness incompetent, 912
- Interference with ordinary course of justice, 165-7, 1122n
- Interior economy, complaints arising out of, 342, 372
- Interlineations, initialed by president, 482
- Interpreter, 477-9, 930, 949
- Interrogation of prisoner, forbidden, 913
- Intoxication, *see Drunkenness*
- Irregularity, minor, not included in charge, 398
- Irregulars, Indian, 6
- Irrelevant facts not evidence, 814
- Irons, prisoner not kept in before trial, except for security, 359; struck off at trial, 473

- JAMAICA court martial, special constitution of, 21n. *See Cullen*
- Jekyll, case of Capt., 699n
- Jervis, case of Capt., *see Simla*
- JOINT TRIAL of offenders, 402, 918;
 - when not, 402; separate proffer of challenge, 495; arraignment, 550; finding, 620
 - accessories, &c., in absence of principal, 1064
 - offences, 402; what not, *ib.*
- JUDICIAL NOTICE, what, 809
- of A.W. in all courts, 82, 1023
- of regulations at C.M., 1022
- of other matters without proof, 809, 1022
- JUDGES, members of courts martial sworn as, 440
- JUDGE ADVOCATE, 460-71
 - how disqualified, 465
 - professional lawyer not selected by general officers, 463n; nor by J.A. General, 463
 - assisted by counsel, 467
 - sworn to secrecy, 471; questionable practice in Bengal, 471n
 - duties of, 466; now enlarged, 463, 470; during finding, 612; during sentence, 469; not *legally* responsible, 469, 468n; how far *morally*, 469n
 - should represent defects in charge before the trial, 414
 - summons witnesses, 889; subject to the judgment of the court after assembly, *ib.*n
 - no longer allowed to prosecute, 472
 - competent witness for defence, 946; evidence taken by president, 480

KIL

- JUDGE ADVOCATE, essential to the jurisdiction of court, 464; may be relieved, 532
- opinion of judge advocate general as to right of recording opinion, 471; summing up, 608n
- how far president of minor courts acts as, 294
- warrant, 464, 1283-5; in India, 1261n
- JUDGE ADVOCATE GENERAL, letters patent, 1279; his duties, 462n, 749, 771
- proceedings forwarded to, 485-6
- supplies copy of proceedings, 489
- may administer oaths, 334n, 1281
- Judgment, *see Finding, Sentence*
- Junior officers, when invested with authority, 147, 436
- JURISDICTION of courts martial, 30
 - over persons*, ordinary, 41n, 58-9; in field, 34; during proclamation of martial law, 37; in default of any other court, 1105n
 - over offences*, military, 37; and *concurrent* with civil courts, and certain criminal charges, 32, 146, 222, 224; *exclusive* over treason, felonies, &c., 1050
 - limited by time, 52; as to place, 40, 42
 - excess of, 435n; doubts as to, discussed when, if occurring to court, 447, 551; if raised by prisoner, 496, 556
 - plea to*, 556; cannot be decided till court sworn, 496; minute, 1302-3
 - DISTINCTIVE, *over persons*, 254-5
 - over offences*, of D.C.M., 259-61; of R.C.M., 262
 - of minor courts, extended, 263; except, in what cases, *ib.*, by whom only, 264, 380
 - authority for extension of, to be recorded in the heading of the inferior court, 265, 1290; and noticed in monthly return of courts martial, 265, 755
- Jurisdiction in Homicides Act, 1122n
- KAFIRS, how sworn, 448n
- Killing cattle, 1219
- KILLING, what constitutes murder, 1116, 1121; when excusable, 1109
- by correction, 1109
- in defence* of chastity, 1108; life, 1110; property, 1108; relations, 1108, 1110, 1113
- in duel, 835n, 1113; fight, 1110, 1113
- by officers of justice, 1107
- for prevention of felonies, 1108; murder in what case, *ib.*

KIL

KILLING, upon *provocation* murder, 1113; manslaughter, *ib.*
 of *rioters*, when only justifiable, 1107; indemnity for, 1104
 by unfair advantage, murder, 1113
 without *intention*, whilst doing another act, may be murder, manslaughter, or misadventure, 1109, 1114
KIR, selling or losing (A.W. 102) 229, 262; value not stated in charge, 387, 689; charge not in disjunctive, 229, 396
 free, of deserter re-enlisting, to be paid for, 188; and value to be stated in charge, *ib.*
 court of enquiry, record of deficiency by, 247; received in evidence, 347, 1015; effect of, 182

L *ABOUR*, see *Hard Labour*

Lance corporals, &c., designated as such in charge, 387
LANCER-RANK, confers valid authority, 168; reduction from, not awarded by C.M., 688; bars trial, 661
Landlords, ill-treating, (A.W. 92) 215, 367
Language, insubordinate, 172, 216
LARCENY, 1160-6; simple punishment, 1159; compound or mixed, 1159
 from dwelling house, 1191; building in curtilage with, 1190; furnished lodging, 1199; person, 1169
 by clerk or servant, 1197; lodger, 1199
 property of, bailies, 1161; corporation, &c., 393, 1166; partners, 1166
 may be found on charge of, burglary, robbery, 834
 may be tried and punished on charge of obtaining on false pretences, 1200; or embezzlement, 1197
Laudanum, feloniously administering, 1125, 1133
LAWFUL COMMAND, what, 595-6
 disobeying, 178, 257, 596
Law-officers of Crown as to trial of felonies by court martial, 222
Laws for the guidance of C.M., 80-4; in the order of their sanction, 82
 common and statute, guide C.M., in trial of civil offences, 100, 1052
 conflict of, precautions against, 84, 810
Lawyer may not read defence, 586
Lazaret, breaking from, 1105
Leading question, 955, 971
Legal adviser, see *Adviser*
Letter D, marking abolished, 119
Letter of recall, disobeying Her Majesty's, 1086

MAJ

Letter, separate, attached to proceedings, 1348
 covering to J. A. G., 486
Letters, effect in evidence, 1043
 of prisoner, when admitted against him, 821-2, 998, 1043
 official, are technically included under private documents, 1010; in what case made evidence, 216, 1016
 original, to be produced, 1034; passages not extracted, 1033
 copies of, may be annexed to proceedings, 1046
 landing in quarantine, 1105
 anonymous, see *Threats*
 patent of J. A. G., 1280
Letter-book, when evidence, 1039
Lex loci, C.M. do not adopt, 84, 810
Life-guards, courts for the trial of, 25
Liberty of speech to prisoner on trial, 588
Limitation, capital punishment, 38
 corporal punishment, 119
 of trial of offences as to time, 52
Line of march, courts martial on, 268, 285, 312; including halts, &c., 268
List of witnesses, to be furnished to prisoner, 416-422; not required from, 424
 placed before court, 425, 579
 "Listed or in pay," 63
Local legislation cannot bind C.M., 810
Loaded arms, what, 1130; for execution party, 759
Lodger, stealing by, 1199
Loose charges, reprehended, 398
Lords, protest by, 178
Loss of proceedings, provision against, 484
 when confirmed, how remedied, 747-8
Lunacy, see *Insanity*
Lunar months, intended by month, 779
Lushington, Mr. Vernon, *Q.C.*, 426

MACHINERY, destruction of, malicious, 1216; riotous, 1217
McCarthy, case of Serjt., 916
McNaughton, case of, 590, 957
MAGISTRATE, aiding civil, 1100
 refusing to assist, 167
 limits to duty of, 1099
Mahomedan, oath of, 447
Maim or mutilation, wilful, 219
 proceedings of C.M. on conviction of, forwarded to Chelsea, 487
 (criminal charge), 1129
 another soldier, 221
MAJORITY, necessary to pass judgment, must be absolute, not relative, 641

MAJ

MAJORITY, on interlocutory decisions, 456
to disallow challenge of president, 497
of two-thirds, how calculated, 616
MALICE, defined, 1118; presumption of, 880, 1121, 1204; how rebutted, 828
collateral proof of, 817-8, 1120
Malicious injuries to property, 1203;
military charge under special article of war, 1207
not necessary to prove personal spite, 1204
Malinger, 217
Manslaughter, 1113-4; punishment, 1115
Manufactory, riotously demolishing, 1217
March, line of, *see* **Line**
MARINES, officers of, may sit on courts martial with land officers, 22, 96
oaths on trial of, 441
soldiers serving as, 51
Marking deserters, &c., abolished, 119
Marks, obliterating, 1087
MARTIAL LAW, power to declare, 36;
jurisdiction of courts martial during, 35; law of England, and not local code, dispensed under, 102-4;
supersedes ordinary law, 35, 101;
trials under, 23, 104, 282
oaths under, 441
occasionally concurrent with ordinary law, 36
military distinguished from, 36, 100
false etymology of, 1
civilians act as judge advocates under, 463
Lord Brougham on, 100
Master of ship, 1105, *ib.*
Mauritius, French law in, 166
Meaning of words, 1044
MEDALS, forfeited, 123; by officer, 117
restoration of, 791
pawning, &c., 229, 262; lost, 348
disposal of, 790
MEDICAL examination before trial, 672;
before corporal punishment, 768
certificate, 672, 693
witness, opinion of, 957, *ib.*
MEMBERS OF COURTS MARTIAL, who may be, 12
how detailed, 21, 42, 427-8
in waiting, 427
challenge to, 500-14
may make affirmation, 443
when liable to other duty, 525
questions by, how proposed, 574;
subject to revision of court, 575
responsibility of, 459
absence during the reception of evi-

MIN

dence prevents return, 530; cause to be recorded, 526
prisoner of war, 526
promotion of, 481; over president, 491
retirement of, 526
amenable to superior courts of law for illegal proceedings, 750
withdrawing those above minimum condemned, 617
each votes as to punishment, 637;
opinion of law officers on this subject, 640
competent to give evidence, 511, 947
Members of parliament, not exempt from mutiny act, 67; their arrest notified to house, 68
MEMORY, REFRESHING, of witness by memorandum, 959
of court, 809
MENACES, robbery by, 1173, 1177
letters containing, 1176, 1178, 1220
Merchant shipping act, 1105
MERCY, recommendation to, 697, 1349
doubt thrown into scale of, 618, 643
Merger, the doctrine of, never regarded as to military charges, 396; now obsolete in civil, 848
Merge, minor offences when allowed to, in the more grave, 381, 397
Merits, defects may be amended which do not affect, 389, 846, 850-4
Mess, stealing from, 222, 393
MILITARY, interference of the, when warranted, 1100
law, persons subject to, 58
Mancœuvres act, 59
murders, act as to so-called, 1122
offences, alone ordinarily cognizable by courts martial, 20; certain civil offences by soldiers cognizable as, 222; unless the civil power applies for the prisoners, 165
training, illegal, 1092
MILITIA, when subject to mutiny act, 23, 59; attached to regular service, 59
officers of, and of regular, cannot be associated on courts martial, 23; exceptions, *ib.*
Militiaman, enlisting, 181
Mill, destroying, 1217; burning, 1210
Ministers of C.M., law proceedings against, limited, 762; who are, *ib.*
Minor courts martial, what, 252
duties of president, 294, 431
extension of jurisdiction, *see* **Jurisdiction**
punishments, awarded by commanding officer, 366; appeal against, to court martial, when allowed, 367, 212; on board Queen's ships, 50

MIN

Minor courts martial, may be pleaded in bar of trial, 561; evidence of, 1024
Minutes, *see Proceedings, Revision*
Misadventure, homicide by, 1109
Miscarriage, feloniously procuring, 1151-2
Misconduct in action, 195
Misdate, how obviated, 849-52
Misdemeanor, defined, 1073
 abettors in, punished as principals, 1058; statute, 1065
Misfortune or chance, when an excuse for offence, 590, 1109
Misnomer, immaterial in charge, 389, 1166n
MISTAKE, witness may correct *his own*, in giving evidence, 578, 960; any made in taking his words down, 578; form of minute, 1330
MITIGATION of sentence, by commuting cashiering, 736; death, 737; penal servitude, 738; corporal punishment, 733
 by remission, 711, 733-7, 785-8
Mixture of officers on C.M., 23, 96, 441
MONEY, obtaining, by false pretences, 1200
 misapplication of public, 163, 205; when *not* fraudulent, 163
 forging order for payment of, 1224
Monomania, 921
Month, how meant, 779
Monthly return, *see Returns*
Moore, action against Sir John, 703n
Moravian, affirmation of, 452
Mordaunt, case of Sir John, 948n
Morgan, Sir Charles, opinions ascribed to him on insufficient grounds, 340n
MOTIVES of witness enquired into, 974
 prosecutor remarked on, 701-2
Mullins, case of Col., 152
MURDER, 1116-22; *see Killing, Malice*
 attempts at, 1125-7
 death must be within year, 1117
 form of charge, 1116
 manslaughter found on charge of, 835
 conspiracy to commit, 1124
 letters threatening, 1128
 military, special trial of, 1122n
 no need to specify manner, 1117
 punishment of accessory, 1122n
Musprat, case of, 919
Muster, false, evading orders relative to, 164
Mute, standing obstinately, 555; by visitation of God, 555n
Mutilation of self, 217; other soldier, 219; generally, 1129
MUTINY, defined, 170; *distinguished* from sedition and mutinous conduct, *ib.*

NUM

MUTINY, evidence of, 820-4, 864
 may be tried summarily, 418
 conspiracy to, 170; exciting to, 1089
MUTINY ACT, first, 2n; first of annual series, 92n
 paramount authority of, 82, 84
persons subject to, 58-9
 specifies offences punishable by death within the realm, 38; empowers Her Majesty to make articles of war, 37, 93
 continuance of, 85; in force *abroad*, *ib.*
 from and after publication in orders, *ib.*
 allowed to expire, 2, 91
 E. I. Company's repealed, 58n

NAMES of *persons*, 388-93, 1166;
 variances how amended, 389, 846-7
 unknown, person tried, 390
of office, &c., instead of proper name, 1166n
Napier, Gen. Sir C., 466n, 606, 634n
Native troops in India, trial of, 6
 articles of war, 58n, 110n
 witnesses of rank, 941
NAVAL courts martial, sentence of, complete without confirmation, 550n, 669, 710n
 courts of enquiry, 337
 regulations, 337n, 426n, *Page vi.* (b)
 witnesses before, 905n
 stores, having in possession, 1067
Necessaries, *see Kit*
Necessity, pleaded as defence, 594
Neglect of duty not presumed, but to be proved by prosecutor, 830
Neglecting to obey orders, 178
New trial, when illegal, 560, 728; when allowed, 527, 535, 728
Newcastle, articles of Earl of, 466n
NIGHT, definition of, for purpose of burglary, &c., 1184
 armed or disguised at, 1193
Nolle prosequi, effect of, 916n
NON-COMMISSIONED OFFICERS, to be placed in arrest, 358
 punishments of, 126-8, 687-8; sometimes extreme, 127
 are within all provisions as to soldiers, 126, 254n
 reduction of, *see Reduction*
Northumberland, articles of Earl of, 196
Notes, witness may refer to, 959
NOTICE of trial, 416-9
 to produce writings, what sufficient to let in secondary evidence, 1035
Noxious thing, administering, 1135
NUMBER, regimental, of soldier, 388
 sufficient to compose court, 14, 271, 279, 292, 304n, 310

NUM

NUMBER, court reduced below, 526
variance in allegation of, 855
of witnesses, 868-871

OATH, definition of, 444
attendant ceremony, 447
of members, administration of, 440, 520; if peers, 446; form of words, 440*n*; adapted for purposes of enquiry, 817; on trial of marines, 441
of judge advocate, words, 440*n*; why modified, 471; how understood in Bengal, *ib. n*
of savages, dispensed with, 453
of witnesses, 446, 573; words, 445
may be administered on the common prayer book, 447
substitution of affirmation, or declaration, 45-23; words, *ib.*
false, 146, 439, 907-9
what religious principle is required by the law, 923
not administered at courts of enquiry, 334; except, 347
nor on trial of challenge, 500
taken in form witness declares binding on his conscience, 449, 451
unlawful, administering, 1090
OBJECTION to jurisdiction of court, 559
not made till court is sworn, 496, 552, 556
an individual member, 496; not to court collectively, *ib.*; except as to jurisdiction, 559; *see Challenge witness*, when made, 910
particular question, 574; how tried, 576; witness ordered out of court, 572
may be in writing, 574, 958
entered on proceedings, 574; minute, 1318
by prisoner, recorded, 969, 1316
OBLITERATING crossing on cheques, 1224; will or codicil, 1168
broad arrow or marks, 1087*n*
Obstructing civil justice, 1657
Obstructions on railroads, 1137*n*
Obtaining by false pretences, 1200
OFFENCES, classification of, 110, 256, 1066
beyond sea tried at home, 10, 41; punished as if committed at home, 10, 41
at home may be tried abroad, 10, 41
cognizance of, extends beyond limits of the command of the officer convening the court martial, 10, 853
grave, not to be tried on indefinite charge, 265, 380
cognizable by general court martial, 257-8, 1050-1225; by general or

OPP

district court martial, 259-61; by any court martial, 262
punished peremptorily by mutiny act, 141; by articles of war, 142
military, punishable by death, 169; penal servitude only, 205; forfeitures of pay, 211; by other punishments, 215-229
criminal or civil, 1050-1225; not tried with military, 401; what punishable with corporal punishment, 1132, 1175
prisoner found guilty of minor, included in that charged, 831
under former acts cognizable under existing mutiny act, 99
to be investigated, when possible, where they occur, 40
Offenders, when release precludes trial, 566-7
Offer of violence, 172*n*
OFFICE, execution of, 172, 1122*n*; constructive, 174; the fact must appear in charge, 406
name of, 1166*n*
Officers of military prisons, a civil establishment, 176
OFFICERS, complaint by, not to be peremptorily disposed of by superior officer, report must be submitted to Her Majesty, 370
cannot be *cashiered*, suffer death, or penal servitude, but with consent of Her Majesty, 711; except, since 1813, in India, 711; and more recently in the Crimea and China, 711*n*
striking or ill-treating soldier, 215
wrongs of, how redressed, 369
in command abroad, subject to trial by civil court in England for acts of oppression, &c., 753, 1109*n*
court martial book, 627
disputes of, 227-8
punishments of, 114-7
see N.-C. officers
OFFICIAL secrets privileged, 894, 932, 1007-8
letters, not special class of evidence, 1010; exception, 1116
Onus probandi, burden of proof, 829
Open court, all proceedings in, 454
OPINION of court martial, 614; not to be recorded in the minutes as unanimous, 615; altered on revision, 729
of witness, when evidence, 957
of individual members, whether judge advocate should retain a memorandum of, 614
Opium, drunk from effects of, 157
Oppression abroad, 753

OPT

Option of trial, irregular to allow, 363; exceptions to this rule, 367; principle of allowing, 367

ORDER, preserved in court, 430, 435
disobeying garrison, 178, 262
see Lawful Command
for money or goods, forging, 1224

Order-book, when evidence, 1039

Order in council, authority of, 82, iii.; as to troops on board ship, 85

Ordering witness out of court, 569, 572, 942, 1300

Orders, accepting foreign, 1086

Ordinary course of justice not to be interfered with, 77, 165

ORDNANCE, *see War Department*
corps, regimental court martial in, 310

Originals, to be produced, 1033-4; but copies may be attached to proceedings, 1046

Overloading carriages (A.W. 94), 215

Overt act, of treason, 1069; indicating intention to commit arson, 1205-6

Ownership, questions as to, 393, 1166; variances amended, 846-7

PACKING courts martial, how prevented, 21

PARDON, of *convicted offenders*, by Sovereign only, 731; effect of, *ib.* when bar to trial, 546-7

Parade, absence of from, 251

PAROLE, arrest on, 355
evidence, 808

Parliament, members of, 67, 1007

PARTIES, to trial, *see Prisoner, Prosecutor*; consent of, cannot effect the constitution of court, 528; may influence the admission of evidence, 528, 992
not before the court, to be referred to cautiously, 587, 706

Parts, not to be received, of admissions, 1003; private writings, 1033; reason of exclusion, 1003n

Passes, forging, 1221n

Paul, St., misjudged from circumstances, 875

Pawning necessities, medal, &c., 215, 262

PAY, all persons in, subject to mutiny act, 65; but this does not include listing money, 66
of prisoner accounted for on acquittal, 757, *see Complaints, Forfeitures, Good Conduct*

Pay-list, evidence when, 872, 1017

Paymasters, members of C.M., 12

Pay-serjeants, liability of, 207n

PEERS, when officers, liable as others to martial law, 68; when members of C.M., sworn as others, 446

POL

PEERS, give evidence and afterwards vote as judges in House of Lords, 511n

PENAL SERVITUDE, 646; substituted for death by court, 38n, 1052
death commuted for, by revising authority, 729
commuted to imprisonment, 737
applicable for military offences, 205
carrying into effect sentence, 770; judge hesitating to make order, 406; form of order, 770n; on certificate of J.A. G., 771
officers sentenced to, cease to belong to service, 773; soldiers not till discharged, *ib.*
commencement of term, 772; of offenders under sentence, 647
removal of offenders under, 781

Pension, *see Forfeiture*

PENSIONERS, *see Reserve Force*
staff-officers of, when available for court martial duty, 12

PEREMPTORY PUNISHMENT, what is, 111
offences subject to, 141; necessarily awarded by C.M., 636

PERJURY, defined, 146, 907; civil punishment, 146n
court martial may suggest prosecution of witness for, 439, 907
now cognizable by court martial, 146
as to best of belief, 956
proof on trial of, 1018
two witnesses required, 868
subornation of, 146

Perry, case of Lieut., 970

PERSON, act as to offences against, 1123
injury to, 1129-57
stealing from, 1171-5

Petition of right, 36

Personation, felonious false, 1226

"Petty" omitted in limitation of felonies triable by courts martial, 222

PLACE of assembly changed, 523
of imprisonment, not fixed by court, 686; by whom, 774; changed, 780
when in civil gaols, 776, 778
of trial, 10, 41
variances as to, 854

Plain clothes, 175

PLEA in bar, of trial, 556; of judgment, 586-97; to jurisdiction, 559; not decided till court sworn, 496
of guilty, 553, 1005

PLUNDER, leaving colours, post, &c., in search of, 199, 200, 257
of ship in distress, 1196

Poison, administering, 1125
attempting to, 1126
with intent to annoy, 1135
to procure abortion, 1151n

POLICE, acting in support of, 1100n

POL

POLICE, larceny by, 1198n
 may summon civilian witnesses, 896
Post, shamefully abandoning, 196
 how used in articles of war, 199
 quitting or sleeping on, 169, 199
Post marks, how far proof, 1040
Postponement of trial, 533-7; to
 enable prisoner to procure counsel,
 475, 536
 of cross-examination by prisoner,
 577, 1309n
PRECEDENTS of CIVIL COURTS, when
 admissible, 408, 821, 831
 not always applicable, 82n, 408, 581n
PREROGATIVE, offences injurious to the
 Queen's, 1075; supersession of, 10
 officers removed by, 33n, 750, 793n
Presence, constructive, 1057
PRESIDENCY, government of, suspension
 of trial, 522; must concur in cer-
 tain sentences, 713, 1346
 warrant to officer commanding, 1263
PRESIDENT, rank of, 15; how qualified,
 16; not superseded, 491
 duties of, 430-1
 of G.C.M. appointed by warrant or
 order, 15, 273, 427n, 1286
 clears court, 454; preserves order,
 430, 435
 initials erasures, 482
 records evidence of judge advocate,
 480
 takes votes, 614; has casting vote,
 456; when not, 456, 497, 616
 court adjourns by order of, 524
 challenge of, 497; disallowed by two-
 thirds of court, 497; minute,
 1293
 casualty to, next senior may be ap-
 pointed, 529
 must affix the date of signature to
 proceedings, 692; form, 1341
 when under rank of captain, 17
Preston, half-pay officers shot by court
 martial at, 60n
Press, reporters for, 454, 492
Presumptive evidence, 873-6
PRESUMPTION of innocence, 877
 intention, 879; to desert, 182
 law and of fact, 877
 exercise of office, 872
 due attestation, 872
 payment from later receipt, 878
Protences, false, 1200
Prevarication, how punished, 439
Previous convictions, *see Convictions*
Prima facie, case must be made out,
 before trial ordered, 384
Priming (Loaded Arms), 1130
PRINCIPALS, competent witnesses against
 accessories, 917; in first and second
 degree distinguished, 1057

PRI

PRISON, MILITARY, offences in, 176; of-
 ficers of, a civil establishment, 176
 prisoner removed from, 781
 corporal punishment in, 769
PRISONER, 473n; *see Arrest, Escape*
 before trial, unnecessary detention
 of, 351; officer on guard, or pro-
 vost marshal, to receive, 360; crime
 of, to be in writing, 361; name of,
 to be returned by officer of guard,
ib.; confined, without written crime,
 does not justify release, 362; not
 kept in irons, 359
ordered for trial, warned, 416-8;
 entitled to copy of charge, 416,
 422
 right to communicate with proposed
 witness or legal adviser, 356; to
 refer to proceedings during trial,
 483
 how to procure his witnesses, 422,
 890; prosecutor, 946; judge advo-
 cate, 946, 480; documents, 899;
 in prosecutor's hands, *ib.*; form,
 1188
 court, how far to assist, 977n
if officer, points out objections to
 charge before trial, 568
 not entitled to *claim* list of officers
 appointed for trial, 427; may re-
 ceive, *ib.*
upon trial must reserve question of
 jurisdiction till the court is sworn,
 496
 right of challenge, *see Challenge*
 may be assisted by friend. *see Adviser*;
 assisted by judge advocate, 468,
 608n
 entitled to personal freedom in court,
 473; when allowed seat, *ib.*
pleading guilty, may cross-examine
 witnesses, call witnesses, and ad-
 dress court, 554; *see Defence*
 formerly allowed a rejoinder at all
 C. M., 82n, 581n; and still at
 minor C. M., 609; contrary to the
 rule of civil courts, 581n
 may object to questions, 574; stating
 his arguments, 574, 958; which
 must be recorded, 574; form, 1314
 latitude in putting questions, 970
cross-examination, right to, carefully
 guarded, 970, 1306n; may defer,
 577, 1309n
 votes equal, in favour of, 616
 guilty of outrageous conduct in pre-
 sence of court, 434n, 473
 sickness of, may cause the adjourn-
 ment or dissolution of court, 635
 liable to new trial, if court dissolved
 without passing judgment, 535
 admissions and confessions of, 1000-1

PRI

PRISONER, notice of trial to, 416-424
 required as witness, 903, 916, 919
PRISONERS, several may be collectively
 tried on the same charge, 402
 separately charged for the same
 offence competent witnesses for
 defence, 915; *query* for prose-
 cution, 916
 collectively arraigned, cannot be
 witnesses for each other, 918;
 rendered competent by separate
 finding, *ib.*; by plea of guilt, *ib.*
PRISONER OF WAR, enquiry on return
 of, officers, 348; court martial on
 soldiers, 124; sentence, 694
 whether liable to trial on parole, 64
 members taken, 522, 526
 (*enemy*) produced as witness, 903
PRIVILEGE of Artillery, 29; dates from
 Henry VIII., *ib.*; household troops,
 25-8
 legal adviser (or client), 930
 parliament, 67-8
witness from arrest, 898
 in not answering questions tending
 to criminate, 961; not those sub-
 jecting to civil suits, 965; not part
 of issue, and tending to degrade,
 963-4
 extends to no others, put for pur-
 pose of impeaching credibility,
 969; such questions may be put,
 968; answer conclusive, *ib.*; en-
 tered on proceedings, whether an-
 swered or not, 969
 may be claimed at any time by wit-
 ness, 967
 person in employ of government how
 far privileged, 894, 932
Privileged communications, 1007-8;
 legal advisers, 930; spies, 931;
 government officers, 932; com-
 mander-in-chief, 894
Prize money forfeited, 137
PROCEEDINGS of courts martial, 480-9
 forms of, 1290. *Page vi.*
 reporting for press, 492
 fair copy from day to day, 482
 access to, out of court, 483
 how submitted to Queen, 717
 how returned for revision, 721
 loss of confirmed, remedied, 747-8
 party tried, entitled to copy, 489
 evidence of statement by witness or
 prosecutor, 1018
 quashed, 731, 749
of courts of enquiry, not evidence of
 facts recorded, 1021; except of
 soldier's absence, 347, 1016
 produced, 331, 1007; *see* 1001
 Professional adviser, *see* *Adviser*
 Promotion of member, 481, 491

QUA

Promulgation of sentence, 743-6
Prosecution always at suit of Crown,
 472; *formerly* by judge advocate,
ex officio, 472*n*; how to be con-
 ducted, 606
PROSECUTOR, 472; allowed legal assist-
 ance, 476
 competent witness, 571, 869, 914
 if possible, not witness for prose-
 cution, 472*n*; must in that case be
 the first witness, 571, 945; testi-
 mony how taken, 571
 sufficient, when *only* witness, 869-71
 wife of, competent witness, 927
 may ask to postpone cross-exam., 584
 prisoner may insist on the testimony
 of, 946; or documents in possession
 of, 899
 must be subject to military law, 473
 illness of, may cause adjournment,
 but not dissolution of court, 537
 may deliver two addresses, 570, 581-2,
 599, 606; but his words may be
 subject of charge before a C. M.
 472*n*, 1018; or may be checked, 606
 when allowed evidence in reply, 600
Protection of witness from arrest, 898;
 self crimination, 961; menacing
 words, 433
PROTEST, judge advocate not to record
 his own in closed court, 469
 officer or soldier may, against sum-
 mary decision in respect to mis-
 conduct in billets, 367
 of Lords in Upper House, 178
PROVISIONS, violence to bringer of, 202-3
 false return as to (A.W. 88), 162, 215
 seizing (A.W. 66), 154, 215
Provost cells, 777
Provost-marshal, impeding, 156; ap-
 pointment of, 759*n*
Provoking speeches, 215, 227
PUBLIC bridge, injury to, 1216*n*
 building, burning, 1212; demolishing,
 1217
 court open to, 454, 492
Punchayats, in Indian levies, 6
PUNISHMENT, *see* *Corporal*, *Discre-*
tionary, *Minor*, *Peremptory*, &c.
 classification of, 111-113
 previous, for an offence, bar of trial
 for the same, 561
 each member to vote as to, 637
 consequent on sentence, 133-140
Punishments, two distinct, where not
 awarded, 687; additional, 123, 132
Purloining government stores, 210
Putting off trial, *see* *Adjournment*
QUAKERS, affirmation, 452; giving
 false testimony, punished as for
 perjury, 908

QUA

Quarantine, offences relative to, 1105
 Quarrels, 147, 228
 Quashing proceedings, 731
 Queen, *see Prerogative, Treason*
 Quelling disorders, 147, 357
 QUESTION, *see Privilege, Evidence, &c.*
 and answer, prescribed by regulations, 480*n*, 573, 954; advantages of, 954
 reduced to writing, 573
 objection, how made, 574; by court, 575; replied to, 574; minute, 1316
 may be withdrawn by proposer, 574, 576
 not answered, recorded, 576, 960
 proposed by member, objected to, 574
 material, omitted, how put, 580
 irrelevant, as to third persons, 933
 as to supposititious facts, 973
 leading, what, 955; when admissible, 955, 971
 witness, refusing to answer, 437, 890
 Quitting ranks, 153, 215, 259

RAGLAN, unprecedented powers to
 Lord, 711*n*

RAILWAY, obstructing, &c., 1137*n*
 station, &c., burning, 1211

Rank, loss of, officer, 115; warrant officer, 130; hospital apprentice, 131; no longer awarded to N. C. officer, 127*n*

RAPES, 1141; evidence of, 1140; recent complaint, 862
 prostitute, &c., protected from, 1141*n*
 character of woman relevant enquiry, 964, 1141; not as to particular acts, 965
 woman not bound to answer, except as to previous connection with prisoner, 965

READING charges, objection to, 952
 documents, *see Documents*

REASSEMBLY, on adjournment, 525
 to revise proceedings, 723

Recall of witness, 579, 613, 1325, 1330

Receiving stolen monies, stores, &c.,
military charge, punishable by penal servitude, 205; as disgraceful conduct, 207, 209, 222

RECEIVERS, of stolen property, 205, 222, 1201; charge, 223, 396, 1202
 triable as accessories, 1061
 thief may be witness against, 917

Recommendation to mercy, 697, 1349

Recommittal of prisoners, 781, 784

Reconcile testimony, witnesses required to, by court, 960, in cross-examination, 971; when confronted, 944

RECORD of illegal absence, 347; evidence on trial for desertion, 1021
 of service, evidence, 1026

REF

RECORDS, falsifying, 142, 215, 1031
 effect of, in evidence, 1012-9, 1026
 RECRUITS, *deserting* before joining, 193
absconding, not having been attested nor having received other pay than enlisting money, 193*n*
 trial of militia, 23
 Recruiting, offences as to (A.W. 95), 215
 Redress of wrongs, 369-71
 REDUCTION of N. C. officers, 126; not from lance rank, 688; form of award, 687, 1337; execution, 789
 warrant officers, 130; schoolmasters, 129
 court below legal number, 526
 Re-examination of witness, by party calling him, 577, 579; to what extent allowed, 978
 Refreshing memory, 959; by court, 809
 Regimental court of enquiry for redress of wrongs of soldiers, 340; appeal from, 342; resort to, how limited, 341

REGIMENTAL COURT MARTIAL, 310
 offences cognizable by, 262; general officers may extend jurisdiction, 263

on line of march, &c., 312
 proviso in army service act, 254
 punishments applicable by, 314
 may impose arrest for contempt on officer senior to president, 435
 undue exercise of power, how controlled, 748

Registers, how far evidence, 1026; how proved, 1028

Regulations, Queen's, judicially noticed by C.M., 1022; authority of, 82, 84

Rejection of evidence for defence, 970

Rejoinder, by prisoner, allowed, 609

Relative rank, 12, 15; protects from violence, 173

Release, *from arrest*, 368; when not bar to trial, 567; without authority, 361; in order to give evidence, 916

Relevancy of evidence, *see Rules, I.*

REMARKS, by court, privileged, 699, 707; in separate letter, 700; *see Court* by confirming officer, 747

REMISSION, 734; contrasted with pardon, 731

of forfeitures, 742

of imprisonment, 785-7

Removal of prisoners, 780-3

REPLY of prosecutor, 582*b*; at his discretion, 600*n*

when evidence in, 600-3
 improper, 607; checked by court, 606; remarked on in summing up, 608

REP

Reporters, 454; accommodation for, 492
REPORTS, spreading false, &c., 148
 confidential, as to C.M., 756
 privileged, 1007-8
 Reprimands, 115, 670
 Reserve forces, 52*n*, 58, 58*n*, 59
 Respondent examined on oath, 914
 Responsibility of members, 459, 752
 Restoration of forfeited service, 791
 Retrospective action, M.A. and A.W.
 have no, 30, 559; nor Q.R., 1360*n*
RETURN, making false, 162; signing in
 blank, 215
 when evidence of facts, 1026
 of courts martial, 755; to contain
 notice of permission to try grave
 offence, 268, 755; and revised sen-
 tence, 755; extracts from the
 Duke's observations on, 397
REVIEW of sentence, by J. A. G. 749;
 by privy council, *ib*.
REVISION, 721-9; order for, &c., must
 be entered on proceedings, 722
 minute of, may be cancelled, 722
 no witness examined on, 724; except
 as to character, &c., 724
matter illegally expunged, received
 on, 725; illegally admitted, not
 expunged on, 726
 what illegalities cannot be amended
 on, 728
 to be noticed in C.M. return, 755
 prescribed form, 722, 1342-3
 Riot, defined, 1094; misdemeanor be-
 comes felonious, when, 1103
 how far the duty of soldiers to sup-
 press, &c., 1100
 indemnity for persons assisting to
 suppress, 1103, 1107
 power of justices without riot act, 1104
 Riot act, proclamation under, 1103; in
 Ireland, *ib.n*; legal effects of,
 1095, 1104
 Rioters destroying buildings, &c., 1217
ROBBERY, 1171-8; by persons armed,
 1175; by putting in fear, 1172;
 which need not have actually ex-
 isted, but is presumed, when, *ib*.
 charged, assault found, 1173
 assault with intent, 1139
 Roster, for C.M. duty, 21, 538
 Royal family, words against (A.W. 39),
 142, 215
RULES OF EVIDENCE, 810; how ascer-
 tained, 1005; binding on courts
 martial, 810
 I. *Evidence confined to points in issue*,
 813; relevancy of proof, 814
 proof of other transactions, 815; on
 a charge of stealing, or arson,
ib.; of desertion, 816; of murder,
 817; on charge implying malice, 818

SEA

conduct and sentiments of prisoner,
 on other occasions, 819; on a
 charge of conspiracy, 820; acts and
 declarations of co-mutineers, &c.,
 821-4; letter written by conspira-
 tor, 823
 as to character, 411, 825-28
 opinion of experts, 957; hand-writing,
 1042; technical knowledge, 958
 II. *Point in issue to be proved by party
 asserting the affirmative*, 829
 charge of neglect of duty must be
 proved, though it involve a nega-
 tive, 830
 III. *Substance of the charge only need be
 proved*, 831
examples in cases of felony charged,
 attempt found, 832, 1139, 1173;
 of slander or disrespect, 833; in
 criminal cases, 834-6; on a charge
 of desertion, 837; of violence to
 superior in execution of office, 838;
 scandalous conduct, &c., 839-42;
 disgraceful, 843
variances, principle of amending,
 845-7; in time, 849; corrected by
 special finding, 850; in place, 853;
 number, 855
 IV. *Hearsay not evidence*, 856-864
See Hearsay, Dying Declarations
 V. *Best evidence to be produced that the
 nature of the case admits*, 865
 distinction between best possible evi-
 dence and strongest possible assur-
 ance, 867
 secondary, when admitted, 866
 single witness sufficient, 868, 871
exceptions, 872
 Ryawick, mutiny act expired after peace
 of, 91
SACKVILLE, Lord G., case of, 9, 54-7
 Sacrilege, 1181
 Safeguard, what, 204; forcing, *ib*.
 Savage, examined without oath, 453;
 by leading questions, 955
 Savings bank deposits, 138
SCANDALOUS CONDUCT, 158
 framing charge, 410; obsolete forms,
 &c., 159, 411
 not being found, offence no longer
 within peremptory article, 159;
 but breach of good order or disci-
 pline punishable at discretion of
 court, 839-842
 School, not attending (A.W. 32), 215
 Schoolmasters, regulation as to trial of,
 65*n*; punishment of, 129
 Scotch law, 594*n*, 810, 942*n*, 972
 Sea, land forces, when at, 43-51
SEAL of court, when not required, 1029;
 no longer used for warrants, 1271

SEA

Seat for prisoner, 473; witness, 572
 Seconds, *see Duels*
 Second trial barred, 33n, 560, 728
 SECONDARY EVIDENCE, 865; when admitted, 866; but must always be legal evidence, 865
 when better is producible, suggests suspicion of fraud, 866
 Secrecy, oath of, 440, 442; for judge advocate, 440, 471; practice in Bengal, 471n
 Secrets of State, 932; official, 894
 Sedition, 170, 1074
 Seducing from duty, 1089
 SENDING explosive substances, 1137
 threatening letters, *see Threats*
 Seniority, 15, 491
 SENTENCE, *see Commutation, Corporal, Imprisonment, Review, Revision*
 discretionary, 114-130
 peremptory, 112, 636
 summary, 434-5
 irregularity in passing, pointed out to court by the judge advocate, 466; to confirming authority, 467-8
 form of, none prescribed by law, 644; but forms authorised by Q.R., *ib.*, 1337-9; noted in margin, 388n
 must be signed by president, 692
 original, what, 647; and revised to be inserted in C.M. returns, 755
 copy of, may be demanded, 489
 inoperative, till confirmed, 710
 not subject to review by courts of law, 750
 execution of, 758-795
 promulgation of, 743-6
 Sentinel asleep, or quitting post, 169, 199, 257
 SEPARATE trial of prisoners, 402n, 919
 letters attached to proceedings, 1349
 SERJEANT to be put in arrest, 358
 colour-, C.M. cannot reduce to platoon, 127n
 Servants, theft, &c., by 1197-8; by persons occasionally employed as, 1197
 Service, *see Forfeiture, Restoration*
 Severity, cases of extreme, 127
 Servitude, *see Penal*
 Ship, on board, proceedings of C.M., 268; specially reported, 312; corporal punishment, 119
 SHIPS of war, military C.M. not held on board, 42, 48
 burning or destroying, 1125n
 Shooting with intent to murder, 1126; to maim, 1129
 Shop, breaking into, and stealing, 1191
 Short-hand writer, sworn, 440; fair copy of notes, day by day, 482
 Sight, tampering with (A.W.81 III.), 215

SUG

Signature of president, 692, 1341
 Sikh witnesses, 447; trials in levies, 6
 SIMLA court martial 336, 353, 471;
 Duke of Cambridge on, 747
 Simmons, Major Egbert, *page vii. (a)*
 Simmons on Courts Martial, 462n
 Single witness, sufficient, 868-71; except, 868
 Sleeping, *see Sentinel*
 Smith, case of Rev. J., 23n, 100
 Sodomy, 1140, 1154
 SOLDIER in law excludes officers, includes N. C. officers, 254n
 when amenable to courts martial for civil crimes, 222, 1050
 redress of wrongs of, 341, 372-3
 seducing from duty, 1089
 Soliciting to murder, 1124
 SOLITARY CONFINEMENT, 680-3; where not awarded, 681; remission of, 734
 limitation does not refer to any former sentence, 683
 Special finding, 850-5
 Spreading false reports in action, 148
 Stabbing, *see Wound, Weapon*
 Stack, firing, 1214n; attempt, 1206
 STAFF officers on, available for C.M. duty, 12; of pensioners, *ib.*; except, *ib.*
 act as prosecutors, 472
 Stamping coin with words, 1084
 Starving, murder by, 1117
 Statements, conflicting, 977-8, 984-5;
 witness recalled for, cross-examination as to, 977n
 Statutes, not necessary to prove, 1022
 STEALING from a comrade, &c., 235
 the person, 1169; house, 1194
 horses, cattle, &c., 1167
 stores, 1087; *see Embezzlement*
 civil offence, 1160; *see Larceny*
 Stephen on criminal law, 462n, 550n
 Stolen property, how dealt with, 223;
 see Receivers
 STOPPAGES, when court to specify amount, 200, 689; when, until deficiency made good, 689
 amount to be distributed by court when several offenders, 402
 remission of, 742
 STORES, stealing, 200, 1087
 false return of, 142, 231
 Storekeeper, when subject to mutiny act, 68
 Strangle, with intent to murder, 1126
 to commit an offence, 1132
 Striking soldier, 215; superior, 172-7
 Stupifying drug, administering, 1133
 Subornation of perjury, 127
 Substance of charge proved, 831
 Studdis, case of Gunner, 77n
 Suggestive questions, 970

SUI

SUICIDE, 1112*n*; accessories in, *ib.*
 attempt to commit, felony, 1127*n*;
 punishable by C.M., 230
SUMMARY award by commanding officer,
 366, 381, 398; appeal from, when
 allowed, 367; on board ship, 60
 of evidence, 384; in navy, 426*n*
 witness may be examined as to con-
 tradictory statements in, 975-6
 Summing up by J. A., 582*a*, 608, 608*n*
SUMMONS to witness, 896, 1287
 to produce documents, 899, 1280
SUNDAY, punishment on, 766
 court does not sit on, 524
 judge advocate draws pay for, 466*n*
SUPERIOR OFFICER, violence to, 172,
 215*, 406; insubordinate language,
 172, 215*, 609
 includes lance-corporal, 173
 Supplies, seizing, 154, 259
 Suppression of riots, 1095-9
SUPREMACY of known law (of England),
 74-5; enforced by penalties, 165;
 invaded by subjecting soldiers to
 foreign codes, 79-81
SURGEON, certificate by, 672, 768
 member of courts martial, 12, 15
 Surrender of, *see Fortress*
SUSPENSION, prohibited, 115*n*; except
 warrant officers, 130; hospital ap-
 prentices, 131
 of proceedings in India, 522
 Sutcliffe, Dean, 1(3), 197
 Sutlers, *see Camp Followers*
 Sword, given up by officer on arrest, 353

TAKING, what, in larceny, 1161

TAMPERING with eyes, 139, 215
 with oath of secrecy, 471*n*
 Taylor on evidence, 462*n*, 811
 Telegraph, injuring, 1216*n*
 Tenant, larceny, &c., by, 1199
 Testimonials used on defence, 1047
 Text-book, articles on war, &c., when
 not, 77
 Theft, *see Disgraceful, Larceny, &c.*
THREATENING letter, sending, demand-
 ing money, 1176; accusing of
 crime, 1178; threatening to kill,
 1128; to burn or destroy, 1220
 language, 172, 262, 409
THREATS to accuse of crime, 1179
 to obtain money, &c., 1177-8
THROWING injurious substances, 1137
 gunpowder into buildings, 1216
 wood, &c., on railway, 1137*n*
 Tichborne trial, ruling in, 930
 legislation suggested by, 1226
TIME and place, how far proved as laid,
 847-54
 of sitting of courts martial, 526
 limitation of jurisdiction as to, 52

VEN

Tour of C.M. duty, counted, 538
 Traitorous words (A.W. 39), 142, 215,
 409
TRANSFER of deserter on conviction, 187
 of person committed as deserter,
 193*n*
 Transmission of proceedings, 485
 Transportation, *see Penal Servitude*, 646;
 judge hesitating to make order, 406
 Transports, C.M. on board of, 312
TREASON, high, jurisdiction over, ex-
 pressly given to general courts mar-
 tial, 1050
 dealt with as felony, 1076
 punishment of, 1071
 misprision of, 1072
Treason-felony, 1069, 1070
TRIAL, former, bar to trial, 560, 728
 application to put off, 533
 joint, 402, 495, 550, 620
 second, when illegal, 728
 new, may be had after sentence of
 illegally constituted court, 728
 separate of prisoners, 402*n*; may be
 applied for, 919
 suspension in India, 522
 Trigger, drawing, with intent, 1126
 Troops raised abroad, 58
 Truce, improperly sending, 142, 215
TRUTH, circumstantial variations con-
 sistent with, 986
 tested by cross-examination, 791
TWO-THIRDS majority of, required for
 death, 616
 for disallowing challenge of president,
 497
 how calculated, 616*n*
 Two witnesses, when, 868; to confes-
 sion, 992*n*

UNKNOWN person, injury to, 391
 name being, persons tried, 390
 Unlawful oath, *see Oath*
UNNATURAL act (A.W. 81), 225, 259
 crime, 1154-6; minimum punish-
 ment, 647*n*; *see Threats*
 Utrecht, law military after peace of, 92

VAGUENESS in charge condemned,
 411, 457
 Vandeleur, Col., general order, 1034
VARIANCE, between statement and proof,
 846-7
 in time, 849-51; place, 853-4, 847;
 names, 389, 847; number, 855;
 the offence charged, 831-53; value,
 855; words, 833
 when amended, 289-90, 846
Venue, questions respecting, no longer
 arise on courts martial, 10, 53

VER

- Veracity, evidence to *general* character of witness for, alone admissible, 813*n*, 980
 Verdict, *see Finding*
 Vices, plundering in distress, 1196
 quitting in quarantine, 1225
 Vexatious appeal, *see Appeal*
 Viaduct, injuring, 1216*n*
 View of place by court, 429*n*, 523;
 by some members an exception to principle, 429*n*
 VIOLENCE to superior, *see Superior*
 to bringer of provisions, 203
 of prisoner in presence of court, 436
 corporal punishment for crimes of, 1132
 offer of, what, 172*n*
 Visitor of military prison, 176, 769, 792
 VOLUNTEER corps, when subject to M.A., 5, 58, 1351
 courts of enquiry in, 349, *page* viii. (b)
 permanent staff, trial of, 5; N. C. O. enlisting, 181*n*; G. C. M., 276, 1351; D. C. M., 293
 now termed auxiliary forces, 58*n*
 Votes collected by *president*, 614; order of taking, *ib.*; when equally divided, 616, 619, 643; *see Majority, Two-Thirds*

- WAITING, officers in, 14, 426, 520;
 do not count tour of duty, 538
 Wall, case of Governor, 1109*n*
 War, articles of, *see Article*
 Department, civil officer of, 41*n*;
 officers or soldiers employed in, 58, 205
 compassing to levy, 1076
 Warehouse, breaking into, 1191; demolishing, &c., 1217
 WARNING, prisoner for trial, 417, 422
 witness, 901-2; *see Summons*
 Warrant officers, who are, 304*n*; distinctive jurisdiction of C.M., 255;
 courts for trial of, 304; punishment of, 180
 Warrants to convene C.M., 5-11; forms of, 1250-78; do not require seal, 1271
 not confined to limits of command, 10; but extend only to troops specified therein, 11; except in India, *ib.*
 special, issued, naming members, 276; embodying charges, 8, 414; provisions of C.M. act, 11
 not personal, 6, 7, 1271; nor determined by expiration of M.A., 9
 to *judge advocate*, 462; essential to performance of his functions, 464; forms, 1283-4

WIT

- to *president* of G. C. M., 273; form, 1286; if omitted, does not vitiate C.M., 273
Royal, authority of, 82, 84
 Warren, Q. C., Mr., not allowed to read prisoner's defence, 586*n*
 Watchword, treacherously making known (A.W. 54), 200; giving wrong (A.W. 60), 142, 215
 Wathen, case of Capt., 702
 WEAPON, need not be stated in charges of homicide, 1117*n*
 inflicting injuries with or without, 1031; *see Wounding*
 Wellington, Duke of, on framing charges, 397-9; courts of enquiry, 334*n*;
 honourable acquittal, 624*n*; depositions, 1020*n*
 Whitelocke, case of Gen., 569*n*, 942, 958
 WIFE, *see Husband, Prosecutor, Married*
 Will, forging, 1223; stealing or obliterating, 1168
 William III., articles of, 1*n*, 156; occupied East Riding by Danes, 58*n*
 Wiltshire, Fort, 448*n*
 WITNESSES, *see List of, Evidence, Examination, Incompetency, Credibility, Hostile, &c.*
 how summoned or warned in behalf of either party, 890
 if prisoners in custody, &c., 903
 prisoner has right to communicate with his, 356
 form of summons to, 1287-8
 privileged from arrest, 898; and from action for libel or slander, 332, 1356-7
 neglecting to attend, 890-4
 ordered out of court, 569, 942, 1300;
 during discussion, 572
 refusing to be sworn, 437, 890
 oath administered to, 443; form, 445;
 at witness' option, 447; but affirmation allowed, 462
 when sick, how examined, 572, 941
 compelled to produce evidence, 900
 treated with respect, 433; when offered seat, 572; case of native of rank in India, 941
 order of examination, 953
 under examination, 573, 584, 940;
 see Leading Question
 cross-examination, *see Character*
 as to crime, 966; answer conclusive, 966; except as to previous conviction, 979
 upon documents, 978; former statements, 977
 may object to question, 574, 961, 1301; may claim protection of court at any time, 967; *see Privilege*
 may be confronted with another, 944

WIT

WITNESSES may ask for an interpreter, 949
 refusing to answer, &c., 437, 890;
 prevaricating, or perjuring him-
 self, 127, 439
 may correct evidence, 578, 960, 1302
 may refer to notes, 959
 may explain previous testimony, 960
 sworn and not examined, may be
 cross-examined, 977
 recalled on the defence, *after cross-*
examination; examination held to
 be in chief, 579
 material question to, omitted, how
 put, 948; may be recalled for a
special question, 580; in order to
 let in contradiction, 977*; after
 clearing for deliberation, 613
 two necessary to convict of perjury,
 or treason, 868
 under protection of court, 433, 967
 deaf and dumb, 950
expenses, military, 904; civil, at
 home, 905; abroad, 906
WOMEN, offences against, 1141-53
 tried by C. M., 71; *see Married*
Wording of sentence, 644, 673, 682,
 684, 690, 1337-9
WORDS, intemperate, by members, taken
 down and reported, 432
 traitorous or disrespectful, against
 royal family (A.W. 39), 142, 216
 treason or mutiny cannot be substan-
 tiated by, unless in connection
 with facts, 170, 821
 disrespectful, &c., 216*; subject of a
 charge, 858; stated in full, 394, 409
 may be proved by one witness, 869;
 variance as to, 833
 used in addition to figures in sen-
 tence, 388n, 1338
Worship, irreverence at divine, 215,
 259
Wounds, with intent to murder, 1125;
 to maim, 1126; not received in
 action, enquiry as to, 345; *see*
Weapon
Wreckers, 1196

ZEN

Write before Court, witness may be
 directed to, 1042
Writing, hand-, proof of, 1041; ad-
 mitted by party, 1046
WRITINGS, 1047; *see Letters, Documents*
 when preferable to parol evidence,
 1032
 read in open court, 480*; by whom,
 573, 1037
 when annexed to proceedings, 1046;
 when extracts, 1033
 when considered as hearsay, 857;
 except, 821, 858
 legal effect of, 1043
 forging or uttering forged, 1031
 when secondary evidence allowed,
 1010, 1035-9
 prosecutor may give secondary evi-
 dence, when prisoner withholds,
 899, 1035
 prisoner may call on prosecutor to
 produce, 899
 form of summons to produce, 1287
 specified in summons, must be
 brought by witness, 900; but pro-
 duced only by direction of the
 court, *ib.*
 lost or destroyed, 1037
 notice to produce, 1035-6
 withheld after notice, 1037
 interpretation of, 1044-5
 original, to be produced, 1033; im-
 propriety of destroying, 1034
 rule as to cross-examination on, 978
WRONGS, redress of, officer, 369; sol-
 dier, 340, 372
YEARLY inspection, confidential re-
 port, 756; complaints at, 373
YEOMANRY, when subject to M.A., 58;
 now classed as Auxiliary Forces, 58;
 warrant for holding G.C.M. in, 1351
Yorkshire, execution under Danish mili-
 tary law in, 58n
ZENANA, prejudices of Indian, to be
 respected by courts martial, 941

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